Supreme Court, U.S.
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No. 01-

IN THE

Supreme Court of the United States

C. ELVIN FELTNER, JR.,

Petitioner,

v.

COLUMBIA PICTURES TELEVISION, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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119 pp

QUESTIONS PRESENTED

1. In its previous ruling in this case, this Court held that "the seventh Amendment provides a right to jury trial on all issues pertinent to an award of statutory damages under § 504(c) of the Copyright Act, including the amount itself." Whether a series as a whole is one "work" or each episode of such a series is a separate "work," is a crucial issue of damages. The question presented is:

> whether the Ninth Circuit's affirmance of the district court's decision of this issue upon a motion in limine, in view of the district court's refusal to permit Petitioner to introduce evidence on the issue, ignores and flies in the face of this Court's ruling in this very case, and conflicts with the Seventh Amendment and Fed.R.Civ.P. 56?

2. Whether the courts below erred in treating standing requirements of the Copyright Act as waivable, rather than recognizing these standing requirements, laid down by Congress, as a requirement of federal-court jurisdiction under *Bennett v. Spear*, 520 U.S. 154 (1997), which may not be waived and which may be raised at any time?

PARTIES TO THE PROCEEDINGS

C. Elvin Feltner, Jr. was defendant-appellant below and is the petitioner in this Court.

Krypton Broadcasting of Birmingham, Inc., Krypton Broadcasting, Inc., Krypton International Corporation, Krypton Broadcasting of Ft. Pierce, Inc., Krypton Broadcasting of Jacksonville, Inc., North Florida 47, Inc., WTWV, Inc., Daniel S. Dayton, and Alfred F. DeCuir were defendants below, but have since been dismissed. App. 3a. Krypton International was also an appellant below in the first appeal on issues unrelated to the questions presented here. App. 8a, n.2.

Columbia Pictures Television, Inc. was the plaintiff-appellee below and is the respondent in this Court.

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PETITION FOR A WRIT OF CERTIORARI

C. Elvin Feltner petitions for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit in Columbia Pictures v. Feltner, No. 99-56215.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Ninth Circuit, App. 1a, is reported at 259 F.3d 1186 (2001). An earlier decision of this Court in this case, App. 25a, is reported at 523 U.S. 340 (1998), reversing an earlier decision of the United States Court of Appeals for the Ninth Circuit, App. 47a, reported at 106 F.3d 284 (1997). Decisions of the United States District Court for the Central District of California are unreported.

BASIS FOR JURISDICTION IN THE SUPREME COURT

The judgment of the Ninth Circuit was entered on July 9, 2001. A timely filed petition for rehearing was denied on August 23, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

Article III of the United States Constitution provides, in pertinent part:

> Section 2. The judicial Power shall extend to all Cases, in Law and Equity arising under this Constitution, the Laws of the United States, and Treaties made or which shall be made, under their Authority; to all Cases affecting Ambassadors, other public Ministers and Consuls; to all Cases of admiralty and maritime Jurisdiction; to all Controversies to which the United States shall be a Party; to Controversies between two or more States;

> between a State and Citizens of another State; between Citizens of different States; between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.
>
> . . . .

The Seventh Amendment to the United States Constitution provides:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

Section 501(b) of Title 17, U.S.C., provides in pertinent part:

> The legal or beneficial owner of an exclusive right under a copyright is entitled, subject to the requirements of Section 411, to institute an action for any infringement of that particular right committed while he or she is the owner of it. . . .

Section 504(c) of Title 17, U.S.C., provides, in pertinent part:

> (1) Except as provided by clause (2) of this subsection, the copyright owner may elect, at any time before final judgment is rendered, to recover, instead of actual damages and profits, an award of statutory damages for all infringements involved in the action, with respect to any one work, for which any one infringer is liable individually or for which any two or more infringers are liable jointly and severally in a sum of not less than $500 or more than $20,000 as the court considers just. For the purpose of this

subsection, all the parts of a compilation or derivative work constitute one work.

(2) In a case where the copyright owner sustains the burden of proving, and the court finds, that infringement was committed willfully, the court in its discretion may increase the award of statutory damages to a sum of not more than $100,000. In a case where the infringer sustains the burden of proving, and the court finds, that such infringer was not aware of and had no reason to believe that his or her acts constituted an infringement of copyright, the court in its discretion may reduce the award of statutory damages to a sum of not less than $200.

Rule 12(h), Federal Rules of Civil Procedure, provides in pertinent part:

(3) Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.

Rule 56, Federal Rules of Civil Procedure, provides in pertinent part:

(a) For Claimant. A party seeking to recover upon a claim . . . may . . . move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.

. . . .

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and

> admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

Rule 7.16, United States District Court for the Central District of California, provides, in pertinent part:

> A motion for reconsideration of the decision on any motion may be made only on the ground of (a) a material difference in fact or law from that presented to the Court before such decision that in the exercise of reasonable diligence could not have been known to the party moving for reconsideration at the time of such decision, or (b) the emergence of new material facts or a change of law occurring after the time of such decision, or (c) a manifest showing of a failure to consider material facts presented to the Court before such decision.

STATEMENT OF THE CASE

Respondent, Columbia Pictures Television, Inc. (Columbia), filed this copyright infringement and contract action on December 17, 1991, against Petitioner, C. Elvin Feltner, Jr., (Feltner) and certain others.[1] Columbia filed its Amended Complaint on January 14, 1992.

On December 1, 1992, Columbia filed a Motion for Partial Summary Judgment on its copyright claim. In that Motion, Columbia claimed that it was the exclusive licensee of the copyrights in four television series - "Who's the Boss?",

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[1] Claims against all except Feltner have been dropped. App. 3a.

"Silver Spoons", "Hart to Hart", and "T.J. Hooker"[2] - that it claimed were being infringed by Feltner. The District Court granted the motion, finding 664 separate infringements of "Who's the Boss?", "Silver Spoons", "Hart to Hart", and "T.J. Hooker" based on theories of vicarious and contributory liability.

When Columbia moved for partial summary judgment in December 1992, Feltner's original counsel conceded Columbia's ownership of the copyrights. Partial summary judgment was granted on September 28, 1993. App. 71a. On January 14, 1994, new counsel, relying in part on Rule 12(h)(3) of the Federal Rules of Civil Procedure, moved to vacate the interlocutory, partial summary judgment order and to dismiss on the ground that Columbia in fact did not own or have exclusive licenses to the copyrights at the time it had filed suit, as is required by 17 U.S.C. 501(b) for statutory standing, and thus the court lacked subject-matter jurisdiction.

The district court refused to hear the motion to vacate and to dismiss for lack of subject-matter jurisdiction on the ground that it was "out of time." App. 82a. The court based its ruling upon Local Rule 7.16 of the Central District of California. App.26a.

A bench trial on copyright statutory damages was held on March 15-16, 1994. At the start of the trial, the district court announced, in an oral ruling from the bench, that it was ruling as a matter of law that each episode of each of the television series involved was a separate "work" for purposes of an award of copyright statutory damages and that it would make one award of statutory damages for each episode infringed. App.

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[2] In fact, Columbia did not obtain exclusive licences for three of the series in question until February 19, 1992, and never obtained an exclusive license in the fourth series.

83a. Despite Feltner's request to present evidence on this issue, the district court did not permit evidence to be submitted. App. 84a-87a. On April 4, 1994, the district court entered judgment for $8.8 million. It held that Feltner had willfully infringed 440 separate works and imposed statutory damages of $20,000 per work.

On appeal, Feltner argued that the district court lacked subject-matter jurisdiction over this case because Columbia lacked the statutory standing to institute a copyright action. App. 48a. The Ninth Circuit refused to consider the issue of subject matter jurisdiction on the ground that Feltner had "failed to demonstrate that the district court abused its discretion in" refusing to permit Feltner to raise this argument for the first time on reconsideration. App. 52a. The court of appeals also affirmed the ruling that the number of works infringed and the statutory damages therefor were questions of law for the court and not questions of fact on which Feltner could introduce evidence. App. 62a-64a.

Upon Feltner's petition for certiorari, this Court, on March 31, 1998, reversed and remanded for a new trial on damages. App. 28a. This Court directed that a jury trial be held on all issues pertinent to an award of damages including the amount thereof. App. 42a. ("[T]he Seventh Amendment provides a right to jury trial on all issues pertinent to an award of statutory damages under § 504(c) of the Copyright Act, including the amount itself.")[3]

After remand to the district court, Columbia filed various motions in limine. In particular, Columbia requested that the district court reinstate its prior decision on the number of works infringed and prevent introduction of any testimony thereon.

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[3] Columbia also asked this Court to reaffirm the district court's holding that each episode of each series was a separate work. This Court did not rule on this request.

Feltner argued that whether an episode of a series is a separate work for the purposes of statutory damages, or whether the entire series is a single work for this purpose is an element of the damage calculation, and under this Court's prior ruling in this case, is "factual and fall[s] within the province of the jury." App. 21a. The district court granted the motion in limine, ruling that this element of damage calculation was one to be decided by the court. App. 21a-22a.

Feltner filed a motion requesting that the case be dismissed because Columbia had not been "the legal or beneficial owner of an exclusive right under [the] copyright[s]" in question at the time it filed suit and therefore the district court lacked subject-matter jurisdiction. The district court held that this issue had been waived. App. 26a, n.1. The district court acknowledged that Feltner's motion raised "an issue about whether the plaintiff [Columbia] is authorized under the statute to bring an action," and this is an issue of "statutory standing." The court concluded that "this issue can be waived if the defendant does not timely raise it." *Id.*

A jury trial was held on April 7-8, 1999. Following trial, the jury returned a verdict for $31,680,000. After motions for new trial and rehearing were denied, Feltner again appealed to the Ninth Circuit.

On July 9, 2001, the Ninth Circuit upheld the district court on all issues. App. 1a. It again refused to decide the subject-matter jurisdiction issue on the ground that, in light of the earlier appellate ruling that Feltner had failed to raise the issue in a timely manner, "the law of the case doctrine bars reconsideration of the issue . . . ."[4] App. 6a-7a. As for the jury

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[4] Whatever force the law of the case doctrine may have in a court of appeals when the prior decision was its own, it clearly does not prevent this Court from reviewing the decisions below.

trial issue, the Ninth Circuit first ruled that the test as to whether each episode is a separate "work" is "whether each episode 'has an independent economic value and is, in itself viable,'" quoting *Gamma Audio & Video, Inc. v. Ean-Chea*, 11 F.3d 1106, 1116 (1st Cir. 1993). The appellate court then noted that the district court had found that there were facts not in dispute, concluding: "the question whether each episode of a television series is a separate work is a question of law because there are no underlying factual disputes for the jury to resolve." App. 10a. The appellate court, however, ignored the facts that (1) the district court's list of undisputed facts did not include whether or not "each episode 'has an independent economic value and is, in itself viable,'" and (2) on that factual issue Feltner had attempted to introduce evidence that the district court had refused to accept, App. 84a-87a, a matter which the Ninth Circuit itself had noted on the first appeal. App. 64a.

A timely filed petition for rehearing and suggestion for rehearing en banc were denied on August 23, 2001.

This petition for certiorari follows.

REASONS FOR GRANTING THE WRIT

1. By its earlier review in this very case, this Court recognized the importance of the application of the Seventh Amendment right to jury trial to issues of damages under the Copyright Act. This Court, in this very case, held that the Seventh Amendment required that the issues going to damages under the Copyright Act are for the jury and not for the judge to decide.

In its responding brief in this Court, Columbia requested the Court to affirm the rulings of the courts below that the statute required that a judge decide whether a television serial, sold or licensed by Columbia only as a coherent whole, was to be deemed to be one "work" or was each episode to be deemed

a separate "work," and that the Seventh Amendment required no other result. This Court did not address that issue in so many words, but it did make clear "that the Seventh Amendment provides a right to jury trial on **all** issues pertinent to an award of statutory damages under §504(c) of the Copyright Act, including the amount itself." App. 42a. (Emphasis added.)

There is no doubt that both in this case and generally the number of "work[s]" that have been infringed is a significant issue "pertinent to an award of statutory damages" for copyright infringement. Indeed, as in this case it is often the only issue of importance: if there were to be found, upon competent evidence, that there were only four "work[s]" infringed, the maximum total damages awarded could be no more than $400,000, rather than the $31,680,000 awarded in this case upon a court finding that 440 "work[s]" had been infringed.

The courts below gave no reason why this Court's emphasis that "all issues pertinent to statutory damages" be submitted to a jury did not mean what it said: "all issues." Rather, without explanation, the courts below just ignored this Court's ruling in this very case.

We respectfully urge that the integrity of this Court's rulings requires that this Court again review the rulings of the courts below. See *In re Sanford Ford & Tool Co.*, 160 U.S. 247, 255 (1895); *Vendo Co. v. Lektro-Vend Corp.*, 434 U.S. 424. 427-28 (1978).

2. This Court has ruled time after time that subject-matter jurisdiction issues may be raised at any time in the course of litigation. Indeed, as in *Louisville & N.R. v. Mottley*, 211 U.S. 149 (1908), this Court has raised the issue itself when others have not. This settled law is set forth in Fed.R.Civ.P. 12(h)(3) as a reminder to all who come before federal courts.

Yet, in this case, the courts below have used a local rule to set a time limit on when the issue may be raised in the district court.

To permit the use of a local rule setting a time limit on a motion to dismiss on subject-matter grounds is a blatant disregard of Rule 12(h)(3) and the settled law of this Court that such an issue can be raised at any time, and certainly while the case is *sub judice*. Once again, we respectfully submit that the integrity of this Court's rulings requires that this result be examined.

I. The Ninth Circuit's Affirmance of the District Court's Holding that It Is a Question for the Court and Not for the Jury Whether Each Episode of a Series Is a Separate Work for Purposes of an Award of Copyright Statutory Damages, Without Permitting Feltner To Submit Evidence Showing a Genuine Issue of that Material Fact, Conflicts with Fed.R.Civ.P. 56, and the Seventh Amendment, and Flies in the Face of this Court's Prior Holding in this Very Case.

In its first review of this case, this Court held, in no uncertain terms, "that the Seventh Amendment provides a right to jury trial on all issues pertinent to an award of statutory damages under §504(c) of the Copyright Act, including the amount itself." App. 42a. The courts below disregarded this instruction.

Under Section 504(c), when a plaintiff selects statutory damages as its remedy, the statute provides for one award of statutory damages per "work" infringed. Therefore, in a case such as this, an essential element of damages is the determination of the number of "works" that were infringed. Thus, whether episodes of a series are each a separate "work" or part of one larger "work" is the critical factor in determining damages. While the Act does not define the term "work," the

case law is in full agreement that, "whether an episode of a series is a separate work, or whether the entire series is one 'work' depends upon whether [each episode] can live [its] own copyright life," *Walt Disney Co. v. Powell*, 897 F.2d 565, 569(D.C. Cir. 1990), that is, whether each episode "has an independent economic value and is, in itself, [commercially] viable." *Gamma Audio & Video, Inc. v. Ean Chea*, 11 F.3d 1106, 1117(1st Cir. 1993). The Ninth Circuit in the instant case recognized this to be the applicable standard. App. 10a.

The Ninth Circuit also recognized that the application of the economic viability test in a particular case is a factual one. *Id.* When it examined the record in this case, however, the Ninth Circuit, applying summary judgment standards, found no dispute of fact on this issue that justified submission to a jury. *Id.* However, the Ninth Circuit ignored the fact that the issue was before the district court on a motion in limine, and not on a motion for summary judgment. Although Feltner argued that, under this Court's previous decision in this case, this very significant element of statutory damages was to be submitted to the jury and not decided on a motion in limine, the district court granted the motion in limine, thus precluding any evidence to show that there is a genuine issue of this very material fact for a jury to decide.

Thus, this Court's holding in this case was ignored and circumvented on the issue most significant to damages. The Ninth Circuit recognized that whether each episode in a series is a separate "work" is a question of fact: depending upon its economic viability. But the Ninth Circuit affirmed the district court's treatment of this issue as one of law – decided on the basis of a motion in limine, without ever giving Feltner an opportunity to demonstrate that there was a genuine issue on this material fact.

Petitioner recognizes that, if there be no genuine issue of material fact, then that material fact can be decided by the court as a matter of law. Fed.R.Civ.P. 56. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), certainly so provides. But *Celotex* also recognizes that, before the district court may make such a decision, it must permit the non-moving party to present sworn evidence showing that a genuine issue exists on the material fact. Indeed, the entire underpinning of *Celotex* is that the nonmoving party had the opportunity of showing, through "affidavits or as otherwise provided in this rule," Rule 56(e), that there is a genuine issue of the material fact.

Here, by deciding the issue of what is a "work" in the context of this case through a motion in limine, failing to consider Columbia's motion as a motion for summary judgment, upon which Feltner would have had the opportunity to present sworn evidence to show a genuine issue of the material fact as to whether each episode of the four serials involved in this case was in fact economically viable,[5] the district court did exactly what this Court in its 1998 decision ruled that it could not do: it decided this very essential element of damage itself. True, it decided it as a matter of law upon the motion in limine. But that in itself deprived Feltner of the benefit of this Court's 1998 holding.

In affirming, the Ninth Circuit recognized that there could be a genuine issue of material fact as to whether a single episode of a serial is economically viable by itself and thus a separate "work" for the purposes of Section 501(c). App. 10a. It then searched the record and found no evidence that in this case there was a genuine issue of that material fact. App. 10a-11a. In so doing, the Ninth Circuit ignored–even though it was

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[5] In fact, Columbia itself did not license or sell the episodes separately, and the practices of Columbia constitute uncontradicted evidence that the series in question were a single "work."

clearly pointed out in brief and in petition for rehearing– that the district court refused to permit Feltner to furnish evidence that, if admitted, at the least would have shown that this material fact was genuinely in dispute. App. 84a-87a. In so doing, the Ninth Circuit joined the district court in refusing to follow this Court's 1998 holding.

II. The Courts Below, on the Ground of Waiver, Erroneously Refused To Consider Feltner's Challenge to the Subject-Matter Jurisdiction of the District Court Based upon Failure of the Plaintiff To Satisfy the Standing Requirement of the Copyright Act, Thus Violating the Well-Settled Law of Standing As Summarized in *Bennett v. Spear*, 520 U.S. 154, 162-64 (1997).

A. The law is well settled that subject-matter jurisdiction may never be waived, whether by express consent, *Jackson v. Ashton* 8 Pet. (33 U.S.) 148 (1834); *Sosna v. Iowa*, 419 U.S. 393, 398 (1975), by conduct, *Dred Scott v. Sandford*, 19 How. (60 U.S.) 393 (1857); *Mitchell v. Maurer*, 293 U.S. 237 (1934); *American Fire & Cas. Co. v. Finn*, 341 U.S. 6 (1951), or even by estoppel, *Mansfield, C. & L.M.R. v. Swan*, 111 U.S. 379 (1884). It may be raised at any time while the case is within the district court, Fed.R.Civ.P. 12(h)(3), or on appeal, *Bender v. Williamsport Area School Dist.*, 475 U.S. 534, 541 (1986), *Arizonans for Official English v. Arizona*, 520 U.S. 43, 73 (1997). Indeed, the issue may be raised for the first time in this Court, even by the Court *sua sponte*, *Louisville & N.R. v. Mottley*, 211 U.S. 149 (1908).

The Ninth Circuit, in the first appeal, held that, because "Columbia properly pled a claim arising under federal copyright law, . . . the district court had subject matter jurisdiction pursuant to 28 U.S.C. § 1338(a)." App. 49a. That ruling – that mere pleading of jurisdiction is sufficient even if

the facts be otherwise – flies in the face of this Court's contrary ruling in *Kroger v. Owen Equipment & Erection Co.*, 437 U.S. 365 (1978). In *Kroger* the complaint had pleaded diversity, and the defendant had in its answer admitted the facts on which the allegation of diversity jurisdiction rested. But on the third day of trial it was disclosed that one important fact on which diversity rested was erroneous. The district court thought it had discretion to finish the trial, and the Eighth Circuit affirmed, saying that "the most elementary considerations of judicial fairness" precluded the belated challenge to jurisdiction, particularly since the statute of limitations had then run and would be a bar to a new action in state court. 558 F.2d 417, 427 (1977). This Court reversed, stating:

> Our holding is that the District Court lacked power to entertain the respondent's lawsuit against the petitioner. Thus, the asserted inequity in the respondent's alleged concealment of its citizenship is irrelevant. Federal judicial power does not depend upon "prior action or conduct of the parties."

437 U.S. at 377 n.21.

Thus, the fact that the complaint pleaded facts on which subject-matter jurisdiction is based is immaterial when a challenge is made to those facts. Indeed, the defendant's concession of those facts is also immaterial when the true facts later come to light. And the fact that Feltner had not raised this issue before the motion for partial summary judgment was granted in the district court is also immaterial The rulings of the courts below bestow upon the parties the power to grant to district courts subject-matter jurisdiction that has been withheld by Congress. As this Court has made clear time after time, that is not the law.

Nor can a local rule of a district court preclude a party from raising an issue of subject-matter jurisdiction on the

ground of timeliness. Fed.R.Civ.P. 12(h)(3) provides in no uncertain terms: "Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action." No local rule can be validly construed or applied inconsistent with that rule. See Fed. R. Civ. P. 83(a)(1).

B. This Court has held that, when a plaintiff sues on an alleged statutory cause of action, the plaintiff must come within the "zone of interest" for which Congress has made the statutory cause available. *Bennett v. Spear*, 520 U.S. 154, 162-64 (1997); *Steel Company v. Citizens for a Better Environment*, 523 U.S. 83, 97 (1998); *National Railroad Passenger Corp. v. National Assn. of Railroad Passengers*, 414 U.S. 453, 465, n.13 (1974); *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150, 156 (1970). As this Court stated in *Steel Company*, "The statutory and (especially) constitutional elements of jurisdiction are an essential ingredient of separation and equilibration of powers, restraining the courts from acting at certain times, and even restraining them from acting permanently regarding certain subjects." 523 U.S. at 101. And Justice Marshall, speaking for this Court, said in *International Primate Protection League v. Administrators of Tulane Educational Fund*, 500 U.S. 72, 76 (1991), "standing is gauged by the specific common-law, statutory or constitutional claims that a party presents." Thus, a plaintiff suing under a federal statute, must meet the statutory standing requirements laid down by Congress or the court lacks jurisdiction to proceed.

In *Bennett v. Spear*, this Court, four years ago, summarized the prudential standing cases of the preceding 27 years, noting that "like their constitutional counterparts, these 'judicially self-imposed limits on the exercise of federal jurisdiction,' *Allen v. Wright*, 468 U.S. 737, 751 (1984), are 'founded in concern about the proper – and properly limited – role of the courts in

a democratic society, *Warth* [*v. Seldin*, 422 U.S. 490 (1975)] at 498." The Court pointed out that "numbered among these prudential requirements is the doctrine of particular concern in this case: that a plaintiff's grievance must arguably fall within the zone of interests protected or regulated by the statutory provision or constitutional guarantee invoked in the suit." 520 U.S. at 162.

The Court noted the truism that "Congress legislates against the background of our prudential standing doctrine . . . ." *Id.* The Court then went on to list various statutory formulations of standing (520 U.S. at 165):

- any person having an interest which is or may be adversely affected, 33 U.S.C. § 1365(g) (Clean Water Act); 30 U.S.C. § 1270(a) (Surface Mining Control and Reclamation Act)
- any person suffering legal wrong, 15 U.S.C. § 797(b)(5) (Energy Supply and Environmental Coordination Act)
- any person having a valid legal interest which is or may be adversely affected . . . whenever such action constitutes a case or controversy, 42 U.S.C. § 9124(a) (Ocean Thermal Energy Conservation Act)
- any person injured in his business or property, 7 U.S.C. § 2305(c), 15 U.S.C. § 72
- competitors, customers or subsequent purchasers, 15 U.S.C. § 298(b)

In addition, and relevant to a discussion below:

- a patentee, 35 U.S.C. § 281, or a successor patentee, 35 U.S.C. 100(d) (the Patent Act)

In each of these statutes, Congress has specified who shall have standing to bring an action under the statute. It is only a person who fits the congressionally imposed definition who has standing. And it is only over a suit brought by such a person, to vindicate the rights established by the statute, that a federal court has subject-matter jurisdiction.

Here, Congress in fact laid down standing requirements as to who may bring an action for infringement of damages. Section 501(b) authorizes a federal suit for infringement of a copyright. But Section 501(b) is quite specific on who has standing to bring such a suit:

> (b) The legal or beneficial owner of an exclusive right under a copyright is entitled, subject to the requirements of section 411, to institute an action for any infringement of that particular right committed while he or she is the owner of it.

Thus, by statute, it is "the legal or beneficial owner of an exclusive right under a copyright" who has standing to bring an action for infringement. And as this Court recognized in *Bennett v. Spear* and many other cases, this requirement is jurisdictional.

In the instant case, the district court, following earlier Ninth Circuit precedent, *Maljack Productions, Inc. v. Goodtimes Home Video Corp.*, 81 F.3d 881, 884 (9th Cir. 1996); *Hal Roach Studios, Inc. v. Richard Feiner & Co., Inc.*, 896 F.2d 1542, 1553 (9th Cir. 1989), recognized that the ownership requirement of Section 501(b) is a statement of "statutory standing," but then went on to hold that "this issue can be waived if the Defendant does not timely raise it." In this holding, the district court erred, and the Ninth Circuit erred in refusing, twice, to review and reverse that holding.

Statutory standing is another way of saying "zone of interest" when the requisite interest is created by statute. *Bennett v. Spear, Steel Company, National Railroad Passenger Corp.*, and *Data Processing* stand for that proposition. Here Congress has created the "zone of interest" by restricting the right to bring an action for infringement of a copyright to "the legal or beneficial owner of an exclusive right under a copyright" at the time of the infringement. It is only such a person who fits within the "zone of interest" created by Congress, and thus has statutory standing. Without such a person before it, the district court has no power to proceed, for it is an essential aspect – and limitation – of the jurisdiction that Congress has given to the federal court.

Thus, in the instant case, the district court correctly recognized that whether Columbia has an exclusive license to the works in question is an issue of "statutory standing." If Columbia had such a license when it filed suit, then it would have fallen into the "zone of interest" permitting this law suit to be brought in federal court. If it had not had an exclusive license at the outset, as has been shown to be the case, Columbia could not bring this action, for it would not have had standing under the statute to do so. Where the trial court erred, and the Ninth Circuit erred in affirming, was in holding that the parties may bestow jurisdiction upon the district court by waiving the standing requirement and going beyond the statutory grant that Congress made in Section 501(b).

Counsel is unaware of any other case that addresses this issue directly under Section 501(b). However, the decisions of the court below directly conflict with holdings of the Federal Circuit in patent cases. The issue of standing of a non-owner, non-exclusive licensee to maintain a patent infringement action has arisen many times. The Federal Circuit has consistently held in such cases that, if the plaintiff did not come within the statutory grant of jurisdiction, the suit must be dismissed. See,

e.g. Rite-Hite Corp. v. Kelly Co., 56 F.3d 1538, 1551-52 (Fed. Cir. 1995, en banc) ("The question of standing to sue is a jurisdictional one."); *Gaia Technologies v. Reconversion Technologies*, 93 F.3d 774, 777-78 (Fed. Cir. 1996) ("Absent ownership of the Intellectual Property, Gaia lacked standing to sue on the patent and trademark infringement claims. . . . The problem for Gaia in this case, however, is not the conduct of the defendants, but Gaia's inability to prove that it was the owner of the Intellectual Property at the time the suit was filed.")

While the specific statutes are distinct, the fundamental concept is the same: In each statute, Congress has specifically legislated who is within the zone of interest so as to be able to file suit to vindicate that right. The Federal Circuit has held that prudential standing emanating from a statute is jurisdictional; the courts below in the instant case have held that it is a standing to be bestowed by the parties no matter what restrictions Congress may have imposed. We submit that the Federal Circuit's rulings are consistent with the rulings of this Court, most recently *Bennett v. Spear*, which mandate the judicial boundary of prudential standing where Congress has established the limit of who may vindicate a statutory right. The courts below have flagrantly violated this Court's instructions by sustaining an action clearly not contemplated by Congress in the Copyright Act.

The facts pertinent to prudential standing here have never been considered by the courts below, which, relying upon waiver of prudential standing, closed their eyes to the evidence. Columbia's motion for partial summary judgment was accompanied by the affidavit of its vice president which set forth that Columbia had the exclusive license to the video programs in question. After the motion was granted, Feltner uncovered evidence which showed that that affidavit did not reflect the true facts, that, in fact, when it filed suit, Columbia

did not have the exclusive license required by Section 501(b). If the evidence uncovered by Feltner, and offered to the district court, reflects the actual fact, the affidavit of the vice president, upon which the district court relied, is erroneous if not perjurious, and Columbia in fact had no standing under the statute to bring this law suit, for it was not in that zone of interest that the statute wished to protect by authorizing the bringing of suit in federal court. As has been noted, the courts below refused to examine this evidence, although it was presented to the district court by Feltner in documentary form, and Columbia has never introduced evidence showing that Feltner's conclusion from the evidence is incorrect.

The record is clear from the four corners of the agreements licensing these works to Columbia that the licenses that Columbia possessed at the beginning of this case were not exclusive, for nowhere in the licenses can there be found the word "exclusive" or any other word, phrase, or combination thereof that purports to convey an "exclusive" license. Columbia has never denied that fact. Moreover, on February 19, 1992, after this case had been instituted, Columbia entered into new agreements with the copyright owners that, for the first time, purported to be exclusive license arrangements for three of the four serials of which infringement was alleged. (At no time has there been any evidence that there existed an exclusive license agreement concerning the fourth series.)

As this Court has made clear, subject-matter jurisdiction, and hence standing, must exist when the case is filed, *Minneapolis & St. Louis R. v. Peoria & Pekin Union Railway Co.*, 270 U.S. 580, 586 (1926) ("The jurisdiction of the lower court depends upon the state of things existing at the time the suit was brought.") A later change in facts does not act to create subject-matter jurisdiction retroactively when it did not exist when suit commenced. *Mullen v. Torrance*, 22 U.S. (9 Wheat.) 537, 538 (1924); 15 Wright, Miller & Cooper, *Federal*

Practice and Procedure, §3844, at 332 (1986). The fact that an exclusive license agreement was entered into after suit was instituted is irrelevant to the issue of standing, except as evidence that there was no exclusive license at the beginning of this suit.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Nos. 99-56215, 99-56331, 99-56733

COLUMBIA PICTURES TELEVISION, INC.,
Plaintiff-Appellee,

v.

KRYPTON BROADCASTING OF BIRMINGHAM, INC., Defendant,
and
C. Elvin Feltner, Jr., Defendant-Appellant.

Columbia Pictures Television, Inc.,.
Plaintiff-Appellant,

v.

C. Elvin Feltner, Jr., Defendant-Appellee,
and
Krypton Broadcasting, Inc., Defendant.

Columbia Pictures Television, Inc.,.
Plaintiff-Appellee,

v.

Krypton Broadcasting of Birmingham, Inc.; WABM Birmingham; Krypton Broadcasting, Inc.; Krypton International Corporation; Wtmv, Inc.; Daniel S. Dayton; Alfred F. Decuir, Defendants,
and
C. Elvin Feltner, Jr., Defendant-Appellant.

Argued and Submitted Nov. 14, 2000
Filed July 9, 2001

Appeal from the United States District Court
for the Central District of California
Edward Rafeedie, District Judge Presiding.
D.C. No. CIV 91-06847-ER

OPINION

Before: PREGERSON, SILVERMAN, and TALLMAN, Circuit Judges.

PREGERSON, Circuit Judge:

This matter comes before the court on three related appeals. Defendant C. Elvin Feltner, Jr. ("Feltner") appeals from a jury verdict awarding the plaintiff, Columbia Pictures Television Inc. ("Columbia"), $31.68 million in statutory damages for violations of the Copyright Act of 1976 ("Copyright Act"), 17 U.S.C. § 101, *et seq.* In a separate appeal, Columbia asserts that the district court erred in denying its motion for attorneys' fees pursuant to the Copyright Act. Finally, in a third appeal, Feltner asserts that the district court erred in facilitating Columbia's efforts to enforce its judgment against him pending appeal by certifying the judgment for registration in other districts pursuant to Federal Rule of Civil Procedure 62(a) and 28 U.S.C. § 1963. We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm.

I.

FACTS & PROCEDURAL HISTORY

Feltner is the sole shareholder of Krypton International Corporation, a holding company that owns all of the stock in defendant Krypton Broadcasting Corporation ("KBC"). KBC,

in turn, owns three television stations in the Southeast, which were also named as defendants in this action.[1] In 1990, each of the three stations licensed television programs from Columbia, either directly, or by assuming the rights and obligations under contracts with former station owners. The licensed programs include the four series at issue in this litigation: (1) "Who's the Boss?"; (2) "Silver Spoons"; (3) "Hart to Hart"; and (4) "T.J. Hooker."

In 1991, the stations failed to make timely licensing payments and Columbia ***1190** terminated the licensing agreements. When the stations nonetheless continued to air the series, Columbia filed the present action in federal district court alleging various claims against the defendants, including copyright infringement. During the course of the litigation, Columbia dismissed all claims against all defendants with the exception of the copyright claims against Feltner. On September 28, 1993, the district court granted partial summary judgment in favor of Columbia, finding Feltner vicariously and contributorily liable for the copyright infringement committed by the defendant stations.

On January 14, 1994, Feltner sought leave to file a motion to vacate the order granting partial summary judgment in favor of Columbia. In the motion to vacate, Feltner asserted that Columbia was not the exclusive licensee of the series in question at the time Columbia filed the lawsuit, and that therefore, Columbia lacked standing under the Copyright Act. The district court denied Feltner's request for leave to file the motion to vacate and did not address the merits of Feltner's standing argument.

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[1] The three subsidiary television stations are Krypton Broadcasting of Jacksonville, Inc. ("KBJ"), Krypton Broadcasting of Ft. Pierce, Inc. ("KBFP"), and Krypton Broadcasting of Birmingham ("KBB").

Columbia elected to recover statutory damages in lieu of actual damages pursuant to § 504(c) of the Copyright Act, which permits an award of statutory damages "for all infringements involved in the action, with respect to any one *work*." 17 U.S.C. § 504(a)(1) (emphasis added). Although Feltner requested a jury trial on the issue of statutory damages, the district court denied the request. Proceeding with a bench trial, the district court found as a matter of law that each episode of each series was a separate "work" for purposes of computing statutory damages.[2] The district court also found that each airing of the same episode by a different station constituted a separate act of infringement. Finally, the district court found that Feltner's infringement was willful. Based on these findings, the district court determined that Feltner infringed 440 separate "works," and on April 4, 1994, the district court entered judgment against Feltner in the amount of $8,800,000. The district court also granted a motion by Columbia for attorneys' fees and costs incurred through April 1994.

A prior panel of this court generally affirmed the district court's rulings, *Columbia Pictures Television v. Krypton Broadcasting of Birmingham, Inc.*, 106 F.3d 284 (9th Cir.

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[2] It is not clear from the record whether the district court reached this decision just prior to trial, or whether the district court reached this decision following the conclusion of a bench trial. The district court's order regarding the motions in limine states that "[b]efore the first trial on statutory damages, and before any evidence had been heard, the Court determined that the Defendant was liable for 440 separate acts of infringement." However, the Supreme Court opinion in this case states: "After two days of trial, the trial judge held that each episode of each series constituted a separate work ...." *Feltner v. Columbia Pictures Television*, 523 U.S. 340, 344, 140 L. Ed. 2d 438, 118 S. Ct. 1279 (1998). Regardless, it is clear that the district court treated the question of what constitutes a "work" under the statutory damages provision of the Copyright Act as a question of law.

1997),[3] but the Supreme [*1191] Court reversed. The Supreme Court held that the Seventh Amendment guarantees Feltner the right to a jury trial "on all issues pertinent to an award of statutory damages under § 504(c) of the Copyright Act, including the amount itself." *Feltner v. Columbia Pictures Television*, 523 U.S. 340, 355, 140 L. Ed. 2d 438, 118 S. Ct. 1279 (1998).

Following the Supreme Court's ruling, we remanded the case to the district court for a jury trial on the sole question of the amount of money to award Columbia, within the range permitted by the statutory damages provision of the Copyright Act, for each of the 440 "works" that Feltner infringed. *Columbia Pictures Television v. Krypton Broadcasting of Birmingham, Inc.*, 152 F.3d 1171 (9th Cir. 1998). The jury ultimately returned a $31.68 million verdict for Columbia. This verdict is equivalent to an award of $72,000 for each of the 440 works infringed, which is within the statutory damages range

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[3] More specifically, on appeal to this court, Feltner asserted, *inter alia*, that the district court: (1) improperly granted Columbia's motion for partial summary judgment because Columbia lacked standing under the Copyright Act; (2) improperly denied Feltner's request for a jury trial; (3) erred in concluding that each episode is a separate "work" for purposes of computing statutory damages; (4) erred in concluding that each airing of the same episode by a different station controlled by Feltner constituted a separate act of infringement; (5) erred in concluding that Feltner's infringement was willful; and (6) erred in granting Columbia's motion for attorneys' fees. With the exception of the motion for attorneys' fees, we affirmed the district court's rulings. *See generally Columbia Pictures*, 106 F.3d 284.

On the issue of attorneys' fees, we reversed the award and remanded the case to the district court because the district court failed to explain its reasoning regarding the amount of the award. On remand, the district court more fully explained its reasoning and determined that the amount requested by Columbia was reasonable. Columbia was ultimately awarded $722,621 in attorneys' fees, and $30,646.47 in costs.

for willful infringement. The district court entered judgment against Feltner on April 14, 1999.

Shortly after judgment was entered, Columbia filed a motion for attorneys' fees and a motion for an order certifying the judgment against Feltner for registration in another jurisdiction. In addition, Feltner filed a motion for judgment notwithstanding the verdict or for a new trial. The district court granted Columbia's motion to certify the judgment, denied Columbia's motion for attorneys' fees, and denied Feltner's motion for judgment notwithstanding the verdict or for a new trial. This appeal followed.

II.

DISCUSSION

A. Feltner's Appeal from the Jury Verdict

Feltner first appeals from the jury's $31.68 million verdict in favor of Columbia. Specifically, Feltner asserts that a new trial is warranted because the district court erred in: (1) denying his motion in limine to dismiss the suit because Columbia lacks standing under the Copyright Act; (2) denying his motion in limine to preclude a jury trial on statutory damages; (3) granting Columbia's motion in limine to reaffirm the district court's prior ruling that Feltner infringed 440 separate "works"; (4) ruling as a matter of law that the two stations that aired "Who's the Boss?" were not joint tortfeasors for purposes of calculating statutory damages; and (5) denying Feltner's new trial motion. We address each of these arguments in turn.

1. *Feltner's Motion to Dismiss for Lack of Standing*

[1] Feltner asserts that the district court erred in denying his motion in limine to dismiss the suit for lack of standing under the Copyright Act. A prior panel of this court already held that Feltner failed to timely raise this issue in opposition

to a motion for summary judgment, and that Feltner failed to satisfy the requirements for a motion for reconsideration. *Columbia Pictures*, 106 F.3d at 290. In light of this prior ruling, the law of the case doctrine bars reconsideration of the issue whether Columbia's standing as an exclusive licensee is properly before the court. **[*1192]** *See Jeffries v. Wood*, 114 F.3d 1484, 1489 (9th Cir. 1997) (en banc); *Milgard Tempering, Inc. v. Selas Corp. of Am.*, 902 F.2d 703, 715 (9th Cir. 1990).

2. *Feltner's Motion to Preclude a Jury Trial on Statutory Damages*

[2] Feltner also asserts that the district court erred in denying his motion in limine to preclude a jury trial on the issue of statutory damages. Here, Feltner argues that in holding that the statutory damages provision of the Copyright Act violates the Seventh Amendment, the Supreme Court effectively found that the statutory damages provision of the Copyright Act is unconstitutional in its entirety. Feltner thus urges us to find that the Supreme Court's decision in this case rendered the statutory damages provision of the Copyright Act constitutionally unenforceable.

This argument is not persuasive. What the Supreme Court held is that to the extent § 504(c) fails to provide a jury trial right, it violates the Seventh Amendment and is therefore unconstitutional. However, this holding in no way implies that copyright plaintiffs are no longer able to seek statutory damages under the Copyright Act. Indeed, the position urged by Feltner is contrary to the express language of the Supreme Court's decision in this case. As the *Feltner* Court stated, "if a party so demands, a jury must determine the actual amount of statutory damages under § 504(c) . . . ." *Feltner*, 523 U.S. at 355. The Court later reaffirmed this point by stating, "the Seventh Amendment provides a right to a jury trial on all issues pertaining to an award of statutory damages under § 504(c) of

the Copyright Act, including the amount itself." *Id.* This language evinces the Court's intent to preserve a plaintiff's ability to seek statutory damages under § 504(c) of the Copyright Act.

Feltner argues that this interpretation of the Supreme Court's decision amounts to an impermissible rewriting of § 504(c). According to Feltner, if the Court finds that § 504(c) is constitutionally infirm because it fails to provide for a jury trial, then the Court must strike down § 504(c) in its entirety and wait for Congress to reenact § 504(c) with a jury trial provision included. This argument fails to understand the Supreme Court's holding in this case. In *Feltner*, the Supreme Court held that § 504(c) provides a remedy for copyright infringement, and the Seventh Amendment provides a right to a jury trial when that remedy is at issue. This holding is consistent with the Supreme Court's interpretation of other federal statutes that provide a remedy but similarly fail to provide for a jury trial. *See, e.g., Tull v. United States*, 481 U.S. 412, 95 L. Ed. 2d 365, 107 S. Ct. 1831 (1987) (regarding civil penalties under the Clean Water Act); *Curtis v. Loether*, 415 U.S. 189, 39 L. Ed. 2d 260, 94 S. Ct. 1005 (1974) (holding that although it is not clear whether Section 812 of the Civil Rights Act of 1968 provides for a jury trial, a jury trial is provided by the Seventh Amendment).

This interpretation is also consistent with Nimmer's reading of the Supreme Court's decision in Feltner. According to Nimmer:

> Eight justices of the Supreme Court have now determined that Congress did not allow for juries to be appointed under Section 504(a), which is therefore unconstitutional; one might therefore conclude that an award of statutory damages cannot ever be invoked against a defendant who demands her right to a jury

> trial . . . . *But in the topsy-turvy world of the Seventh Amendment, a finding that a statute is unconstitutional typically does not render it inoperative.* Whenever the Supreme Court has determined that the particular statute **[*1193]** under examination does not accord the right to a jury but the Seventh Amendment so requires in that type of case, the same pattern recurs: Notwithstanding that the Court holds the enactment of Congress unconstitutional, the statute itself goes on functioning.

Melville B. Nimmer & David Nimmer, *Nimmer on Copyright*, § 14.04[C][2] (2000) (emphasis added).

Finally, we note that since the Supreme Court's ruling in *Feltner*, various courts have conducted jury trials on the issue of statutory damages. *See, e.g., Yurman Design, Inc. v. PAJ, Inc.*, 93 F. Supp. 2d 449, 462 n. 5 (S.D.N.Y. 2000) (stating that "[I]t is worth noting that the question of statutory damages was put to the jury, rather than decided by the Court, given the Supreme Court's decision in *Feltner* ...."); *Segrets, Inc. v. Gillman Knitwear, Co.*, 207 F.3d 56, 62-65 (1st Cir. 2000) (remanding for a jury trial following Supreme Court's ruling in *Feltner*).

Therefore, we find that the Supreme Court's decision in Feltner did not eliminate § 504(c) of the Copyright Act, and we affirm the district court's denial of Feltner's motion to preclude a jury trial on statutory damages.

3. *Columbia's Motion to Reaffirm that Feltner Infringed 440 "Works"*

[3] Feltner next argues that the district court erred in granting Columbia's motion in limine to reaffirm the district court's prior ruling that each episode aired by Feltner is a separate "work" for purposes of computing statutory damages.

Copyright Act § 504(c)(1) permits the copyright owner to recover "an award of statutory damages for all infringements involved in the action, with respect to any one *work*, for which any one infringer is liable individually, or for which any two or more infringers are liable jointly and severally." 17 U.S.C. § 504(c)(1) (2001) (emphasis added). In addition, § 504(c)(1) states that "all the parts of a compilation or derivative work constitutes one *work*." *Id.* (emphasis added). Thus, under the Copyright Act, "each *work* infringed may form the basis of one award." *Columbia Pictures*, 106 F.3d at 294 (emphasis added).

[4] Although the Copyright Act does not define the term "work," every circuit to address the issue has held that "separate copyrights are not distinct works unless they can 'live their own copyright life.'" *Walt Disney Co. v. Powell*, 283 U.S. App. D.C. 111, 897 F.2d 565, 569 (D.C. Cir. 1990) (quoting *Robert Stigwood Group, Ltd. v. O'Reilly*, 530 F.2d 1096, 1105 (2d Cir. 1976)). As applied to episodes of a television series, this test requires us to determine whether each episode "has an independent economic value and is, in itself, viable." *Gamma Audio & Video, Inc. v. Ean-Chea*, 11 F.3d 1106, 1117 (1st Cir. 1993) (citing *Walt Disney*, 897 F.2d at 569). We adopted this test for what constitutes a "work" in a prior appeal of this case. *Columbia Pictures*, 106 F.3d at 295.

[5] In this appeal, Feltner argues that in light of the Supreme Court's ruling, the issue whether each episode constitutes a separate work is a question of fact for the jury to decide, and that because this issue was not presented to the jury, he is entitled to a new trial. Although there may be a case in which the issue of what constitutes a "work" is a jury question, we need not address that issue at this time. In the present action, the question whether each episode of a television series is a separate work is a question of law because there are no underlying factual disputes for the jury to resolve. *Cf. Segrets*, 207 F.3d at 65 n.7 (stating that the Supreme

Court's decision in Feltner "does not require that issues properly decided on summary judgment be remanded to a jury"). As the district **[*1194]** court explained in granting Columbia's motion to reaffirm its prior ruling that Feltner infringed 440 works:

> The facts which underlie the determination of the number of infringements are not disputed .... There are no factual disputes on this issue for the jury to decide. The prior ruling was made by the Court as a matter of law, since there were no factual issues .... The Ninth Circuit noted that the Court made this finding. The Ninth Circuit went on to affirm this Court's determination that each episode in a television series constitutes a separate work .... This holding was not certified by the Supreme Court, and was not affected by the Supreme Court's opinion, and thus remains the law of the case.

Because "[t]here are no factual disputes . . . for the jury to decide," our prior ruling on this issue was not disturbed by the Supreme Court's decision in this case. Accordingly, the law of the case doctrine bars reconsideration of the question whether each episode constitutes a separate work for purposes of computing statutory damages. *See Jeffries*, 114 F.3d at 1489; *Milgard*, 902 F.2d at 715. The district court's ruling on this issue is therefore affirmed.

4. *Feltner's Appeal of the District Court's Ruling That the Two Stations That Aired "Who's the Boss?" Were Not Joint Tortfeasors*

[6] Feltner next argues that the district court erred by allowing two awards of statutory damages for one "work" under Copyright Act § 504(c)(1). Specifically, Feltner asserts that he is entitled to introduce evidence that the two defendant stations that aired "Who's the Boss?" are joint tortfeasors, and

that therefore, each station's airing of the same episode should only count as one "work." This argument is not persuasive for two reasons. First, there is no evidence in the record to suggest that the stations are joint tortfeasors. Second, to the extent that Feltner seeks to introduce evidence to demonstrate his connection with each of the stations, that simply makes Feltner a joint tortfeasor with each station – it does not make each station a joint tortfeasor with respect to the other. *Columbia Pictures*, 106 F.3d at 294. This district court's decision on this issue is therefore affirmed.

5. *Feltner's New Trial Motion*

Feltner also argues that the district court erred in denying his new trial motion. Specifically, Feltner argues that a new trial is warranted because: (1) the jury's verdict was excessive; and (2) the district court erred in excluding certain evidence. We review a district court's denial of a motion for a new trial for an abuse of discretion. *Scott v. Ross*, 140 F.3d 1275, 1281 (9th Cir. 1998).

a. *Excessive Verdict*

[7] [8] [9] Feltner first asserts that the jury's verdict in this case was excessive. As set forth above, the Copyright Act provides a plaintiff the option of electing either statutory damages or actual damages. 17 U.S.C. § 504(a) (2001). In this case, Columbia elected to seek statutory damages. A plaintiff may elect statutory damages "regardless of the adequacy of the evidence offered as to his actual damages and the amount of the defendant's profits." Nimmer, *supra*, § 14.04[A]. "If statutory damages are elected, '[t]he court has wide discretion in determining the amount of statutory damages to be awarded, constrained only by the specified maxima and minima.'" *Peer Int'l Corp. v. Pausa Records, Inc.*, 909 F.2d 1332, 1336 (9th Cir. 1990) (quoting *Harris v. Emus Records Corp.*, 734 F.2d 1329, 1335 (9th Cir. 1984)). Subject to certain exceptions, at

the time this case was tried to a jury, the statutory minimum was $500 and the maximum was [*1195] $20,000. 17 U.S.C. § 504(c)(1) (1998). In the case of "willful" infringement, however, the maximum amount per "work" infringed was $100,000.[4] *Id.* at § 504(c)(2). We will uphold a jury's finding of willful infringement if it is supported by "substantial evidence." *Transgo, Inc. v. Ajac Transmission Parts Corp.*, 768 F.2d 1001, 1013-14 (9th Cir. 1985).

Here, the district court initially held a bench trial and found that Feltner was liable for $8.8 million in statutory damages for infringing 440 works. This award amounts to approximately $20,000 per work infringed. That award was vacated, however, after the Supreme Court held that Feltner was entitled to a jury trial on the amount of statutory damages. *Feltner*, 523 U.S. at 355. The case was then remanded and tried to a jury, and the jury awarded Columbia $31.68 million in statutory damages for the same 440 works infringed. This award amounts to approximately $72,000 per work infringed.

[10] Although the jury's $31.68 million verdict is substantial, it is equal to a per work infringed award that is well within the statutory range for willful infringement. 17 U.S.C. § 504(c)(2). In addition, there was substantial evidence to support a finding of willfulness. *Transgo*, 768 F.2d at 1013-14. For example, it is undisputed that 415 of the 440 works infringed were aired after Columbia filed the instant action. The jury also heard testimony that Feltner was an experienced businessman who understood the nature of Columbia's copyright infringement claims, and who nonetheless continued

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[4] Since this case was tried to a jury, the statutory damages provision of the Copyright Act was amended to increase the range of statutory damages from $750 to $30,000 in most cases of infringement. 17 U.S.C. § 504(c)(1) (2000). In the case of willful infringement, however, a jury may now award up to $150,000 per work infringed. *Id.* at § 504(c)(2).

to air the series in question until well into the course of this litigation. This is sufficient to support a finding of willfulness.

Accordingly, we find that the district court did not abuse its discretion in denying Feltner's motion for a new trial due to the allegedly excessive jury verdict.

b. *Evidentiary Rulings*

[11] Feltner also asserts that the district court erred in denying his new trial motion because the district court improperly excluded evidence from the jury trial. According to Feltner, the district court erred in excluding: (1) the stipulated testimony of Alanna Anderson,[5] which Feltner asserts is relevant to whether Feltner ever really assumed the licenses for the television series at issue in this litigation; (2) evidence of Feltner's reliance on advice of counsel; and (3) evidence that Columbia recovered some of the licensing fees in bankruptcy. To reverse on the basis of an evidentiary ruling, we must conclude both that the district court abused its discretion and that the error was prejudicial. *Defenders of Wildlife v. Bernal*, 204 F.3d 920, 927-28 (9th Cir. 2000).

[12] Feltner asserts that the district court erred in precluding him from introducing into evidence the stipulated testimony of Alanna Anderson because Anderson's testimony demonstrates that Feltner never assumed the licenses between Columbia and the prior owners of two of Feltner's television stations. As the district court noted, however, Feltner would be liable for copyright infringement regardless of whether the licenses were **[*1196]** valid because he broadcast the television series without permission from Columbia. Moreover, Anderson's testimony is generally relevant to the question of

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[5] The record does not state what Anderson's role is in this litigation. For example, it is not clear whether she was employed by one of the parties.

liability rather than to the question of damages, and was thus properly excluded from the damages phase of the trial.

The district court was also within its discretion in excluding evidence of Feltner's reliance on advice of counsel. Feltner sought to rely on advice of counsel to demonstrate that his infringement was not willful. But Feltner refused to answer questions regarding his interactions with counsel at his deposition. Accordingly, prior to the bench trial, the district court precluded Feltner from relying on the defense of advice of counsel at trial.

Following remand from the Supreme Court, Columbia filed a motion in limine to reaffirm the district court's prior ruling prohibiting Feltner from relying on the advice of counsel defense. In opposition to the motion in limine, Feltner offered "to make himself available for deposition on this issue." The district court rejected this offer, stating that "[t]he Defendant cannot now, at the eleventh hour, make himself available for a deposition."

[13] [14] Although courts have recognized that reliance on advice of counsel may be probative of non-willfulness, see *RCA/Ariola Int'l, Inc. v. Thomas & Grayston Co.*, 845 F.2d 773, 779 (8th Cir. 1988), the district court was within its discretion in precluding Feltner from relying on advice of counsel in this case. "The privilege which protects attorney-client communications may not be used both as a sword and a shield. Where a party raises a claim which in fairness requires disclosure of the protected communication, the privilege may be implicitly waived." *Chevron Corp. v. Pennzoil Co.*, 974 F.2d 1156, 1162 (9th Cir. 1992) (citing *United States v. Bilzerian*, 926 F.2d 1285, 1292 (2d Cir. 1991)). Here, Feltner sought to argue that he continued his infringing activities based on the advice of his attorney, while at the same time refusing to answer questions regarding relevant communications with

counsel until the "eleventh hour." Under these circumstances, the district court was within its discretion in precluding Feltner from invoking the advice of counsel defense. *Cf.* William A. Schwarzer, et al., *Federal Civil Procedure Before Trial*, ¶11:37 at 11-29 (2000) (stating that "the court may fashion remedies to prevent surprise and unfairness to the party seeking discovery. For example, where the party claiming privilege during discovery wants to testify at the time of trial, the court may ban that party from testifying on the matters claimed to be privileged").

[15] Finally, Feltner asserts that the district court erred in precluding him from introducing evidence that Columbia received money from Feltner's television stations through the stations' bankruptcy proceedings. At the close of the first day of trial, and at the suggestion of the district court, the parties entered into a stipulation regarding the bankruptcy proceeding evidence. The stipulation, which was read to the jury, provided as follows:

> In the summer and fall of 1993 the three television stations at issue went into bankruptcy. Columbia filed claims for unpaid license fees on over 15 television series or groups of motion pictures which it had licensed to the stations, including the four series at issue in this case. The three television stations were sold to new operators. In 1995 and 1996, Columbia received a portion of the proceeds of that sale which substantially reduced the license fees owing on the 15 series and motion picture groups, including the four series at issue in this case.

On appeal, Feltner essentially argues that he was forced to agree to this stipulation in order to introduce *any* evidence regarding **[*1197]** the bankruptcy payments at trial. This

argument is not sufficient to demonstrate that the district court abused its discretion.

For the reasons set forth above, we affirm the district court's denial of Feltner's new trial motion.

B. Columbia's Appeal from District Court's Denial of Its Motion for Attorneys' Fees

[16] [17] [18] In a separate appeal, Columbia argues that the district court erred in denying its motion for attorneys' fees. Section 505 of the Copyright Act provides for an "award [of] reasonable attorney's fee to the prevailing party as part of the costs." 17 U.S.C. § 505 (2001). In deciding whether to award fees, the district court should consider "the degree of success obtained; frivolousness; motivation; objective unreasonableness (both in the factual and legal arguments in the case); and the need in particular circumstances to advance considerations of compensation and deterrence." *Jackson v. Axton*, 25 F.3d 884, 890 (9th Cir. 1994). A district court's decision whether to award attorneys' fees under the Copyright Act is reviewed for an abuse of discretion. *Yount v. Acuff Rose-Opryland*, 103 F.3d 830, 836 (9th Cir. 1996).

We find that the district court applied the proper legal test and did not abuse its discretion in denying Columbia's motion. *Jackson*, 25 F.3d at 890. The district court's decision denying Columbia's motion for attorneys' fees is therefore affirmed.

C. Feltner's Appeal from District Court's Order Certifying the Judgment for Registration

[19] Finally, in a third appeal, Feltner argues that the district court erred by granting Columbia's motion to certify its judgment against Feltner for registration in other districts. We review the district court's decision to certify the judgment for registration based on a finding of good cause for an abuse of

discretion. *See Chicago Downs Ass'n, Inc. v. Chase*, 944 F.2d 366, 372 (7th Cir. 1991).

Under Federal Rule of Civil Procedure 62(a), a judgment of a United States District Court becomes final and enforceable ten days after judgment is entered. Fed. R. Civ. P. 62(a). At that time, a prevailing plaintiff is entitled to execute upon a judgment.[6] Pending appeal, however, the judgment is only enforceable in the district in which it was rendered, unless the judgment is "registered" in another district by court order. 28 U.S.C. § 1963 (2001). The registration process is set forth in 28 U.S.C. § 1963, which provides in relevant part:

> A judgment in an action for the recovery of money or property entered in any [ ]district court . . . may be registered by filing a certified copy of the judgment in any other district [ ], . . . when the judgment has become final by appeal or expiration of the time for appeal *or when ordered by the court that entered the judgment for good cause shown* . . . . A judgment so registered shall have the same effect as a judgment of the district court of the district where registered and may be enforced in like manner.

Id. (emphasis added). Section 1963 thus permits a district court to issue an order certifying a judgment for registration during the pendency of an appeal upon a finding of "good cause." *Id.*

[20] Although there is no Ninth Circuit law defining "good cause," "the courts that have found good cause have generally based their decisions on an absence of **[*1198]** assets in the judgment forum, coupled with the presence of substantial assets in the registration forum." *Dyll v. Adams*, 1998 U.S. Dist.

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[6] An appellant may obtain a formal stay of the judgment pending appeal by posting a supersedeas bond. Fed. R. Civ. P. 62(d). Feltner did not post such a bond following entry of judgment on the jury's verdict in this case.

LEXIS 1616, 1998 WL 60541 at *1 (N.D. Tex. 1998); *Johns v. Rozet*, 143 F.R.D. 11, (D.D.C. 1992); *Chicago Downs*, 944 F.2d at 372; *Graco Children's Prods., Inc. v. Century Prods. Co.*, 1996 U.S. Dist. LEXIS 10356, 1996 WL 421966, at *36 (E.D. Pa. 1996); *Bingham v. Zolt*, 823 F. Supp. 1126, 1136 (S.D.N.Y. 1993), aff'd, 66 F.3d 553 (2d Cir. 1995). Here, the district court's order granting Columbia's motion simply states that good cause has been shown. Although a more detailed explanation of the district court's reasoning is generally desirable, in the instant action, there is ample evidence to support the district court's finding. Feltner does not dispute that he lacks assets in California. He also does not dispute that he owns substantial property in Florida. This evidence is sufficient to support a finding of good cause. *Johns*, 143 F.R.D. at 12-13; *Associated Business Tel. Sys. Corp. v. Greater Capital Corp.*, 128 F.R.D. 63, 68 (D.N.J. 1989). We therefore find that the district court did not abuse its discretion in granting Columbia's motion to certify the judgment for registration.

III.

CONCLUSION

The judgment of the district court is AFFIRMED. As a part of this holding we affirm the district court's denial of Columbia's request for attorneys' fees in connection with the district court proceedings. We note, however, that Columbia also seeks costs and attorneys' fees on appeal pursuant to 17 U.S.C. § 505. With respect to Columbia's request on appeal, we find that Columbia is entitled to costs and attorneys' fees in connection with its appeal of Case Number 99-56215, but not in connection with its appeal of Case Number 99-56331. The determination of an appropriate amount of fees on appeal is referred to the Appellate Commissioner Peter L. Shaw, who shall conduct whatever proceedings he deems appropriate, and who shall have authority to enter an order awarding fees. *See* 9th Cir. R. 39-1.9.

APPENDIX B

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Filed: March 31, 1999

Columbia Pictures Television, Inc.,	Case No. CV 91-6847 ER (CTx)
Plaintiff,	
v.	Order Regarding the Plaintiff's and the Defendant's Motions in Limine
C. Elvin Feltner, et al.,	
Defendants.	

The Court has read and considered the papers filed in connection with the Plaintiff Columbia Pictures Television's four motions in limine and Defendant Krypton Broadcasting's three motions in limine, and now reaches the following conclusions, which are subject to change as the posture of the evidence demands:

Confirmation of Court's Prior Ruling that Defendant Infringed 440 Works:

[1] The Plaintiff asks the Court to confirm its prior ruling that the Defendant is liable for infringing 440 separate works for the purposes of awarding statutory damages. The statutory damages provision allows a damage award for each work infringed "for which any one infringer is liable individually." 17 U.S.C. §504(c). Before the first trial on statutory damages, and before any evidence had been heard, the Court determined

that the Defendant was liable for 440 separate acts of infringement. This calculation was based on the finding that each station would be individually liable for its own broadcasts, and that each episode in a series constituted a separate work.

[2] The Plaintiff argues that the Court decided this issue as a matter of law, and that therefore the Supreme Court's holding that a jury trial is necessary does not upset this determination. The Defendant argues that this was a factual finding, and must be revisited by the jury because the Supreme Court held that a jury should hear "all issues pertinent to an award of statutory damages."

[3] The facts which underlie the determination of the number of infringements are not disputed. In the original pretrial conference order, the Defendant stipulated to the number of times each station had broadcast infringing episodes, and the number of episodes each station allegedly infringed. Pretrial Conference Order, pages 9-10 (filed February 18, 1994). The parties do not dispute the specific episodes that were broadcast, the number of episodes that each station broadcast, nor the timing of the broadcasts. There are no factual disputes on this issue for the jury to decide. The prior ruling was made by the Court as a matter of law, since there were no factual issues. The Court found that the television stations owned by the Defendant were not joint tortfeasors, and that therefore the same episode broadcast by two stations constitutes two "infringements" as defined by the statutory damages provision. The Ninth Circuit noted that the Court made this finding. 106 F.3d 284, 293. The Ninth Circuit went on to affirm this Court's determination that each episode in a television series constitutes a separate work, and affirmed the finding that each television station would be individually liable for the infringements. This holding was not certified by the Supreme Court, was not affected by the Supreme Court's opinion, and thus remains the law of the case. The Court confirms this

ruling, finding as a matter of law that the Defendant is liable for 440 separate acts of infringement.

Confirmation of Ruling Excluding Evidence of Defendant's Reliance on Counsel:

[4] Prior to the previous bench trial on statutory damages, the Court granted the Plaintiff's motion in limine to exclude evidence relating to the Defendant's reliance on counsel because the Defendant refused to answer questions on this issue during depositions. The Plaintiff now moves to have the Court confirm that prior ruling and exclude evidence of reliance on advice of counsel. The Defendant does not assert that changed circumstances require the Court to reach a different conclusion now. By way of opposition, the Defendant only states that he "is willing to make himself available for deposition on this issue." The Defendant cannot now, at the eleventh hour, make himself available for a deposition. The Court grants the motion, and excludes testimony that the Defendant relied on the advice of counsel when he did not terminate the broadcasts.

Payments and Statements Made During Settlement Negotiations:

[5] Next, the Plaintiff seeks to exclude all evidence of statements and payments made during settlement negotiations between the parties. The Plaintiff relies on Federal Rule of Evidence 408, which the Plaintiff argues excludes settlement evidence for the purpose of determining damages. Rule 408 bars evidence of conduct, statements, or payments made in the course of settlement negotiations, if that evidence is offered for the purpose of proving liability or the amount of damages. The Rule does not bar such evidence if offered for another purpose. Liability has already been established in this case, so evidence probative only of liability is irrelevant even without Rule 408.

[6] Though the issue for the jury is the determination of statutory damages, Rule 408 does not categorically bar evidence that relates to the determination of statutory damages. The determination of statutory damages differs from the determination of actual damages because the factors considered include the willfulness or innocence of the infringement, deterrent effect of damages, and other equity-like factors. Because of these other factors, evidence of settlement negotiations or payments can be relevant. The Defendant can offer this evidence for purposes other than those outlined in the rule. Accordingly, the Court denies the Plaintiff's request for a complete exclusion of settlement evidence.

Amounts Recovered in Bankruptcy Proceedings for Contract and Copyright:

[7] The Plaintiff seeks the exclusion of evidence showing damages recovered from the Defendant in bankruptcy proceedings. These damages consist of both part of the licensing fees due to the Plaintiff under the license agreements, and part of the copyright infringement judgment previously entered by this Court. The Court will discuss this motion with counsel on the day of trial before the Court makes a final ruling with respect to the two types of recovery in the bankruptcy court.

Exclusion of Testimony that Defendant Did Not Assume Licenses:

[8] The Plaintiff seeks to exclude the stipulated testimony of Alanna Anderson on the issue of whether the Defendant assumed the licenses for the television programs at issue. The Defendant contends this testimony is relevant to statutory damages because it involves the conduct of the parties. However, whether the licences were valid is not relevant to infringement or statutory damages for infringement. The Defendant would be liable for copyright infringement

regardless of whether the licenses were valid or not, since the Defendant broadcast the programs and did not pay the licensing fees. Also, this testimony could confuse the jury, and could only be used by the Defendant to reargue liability. Accordingly, the Court grants this motion, and excludes testimony that is relevant only to whether the Defendant assumed the stations' license agreements with the Plaintiff.

Motion to Strike Defendant's Reply to Objections to Jury Instructions:

[9] The Plaintiff moves to strike the Defendant's reply to objections to jury instructions, on the ground that such a reply is not contemplated under the local rules. There is no rule which bars this filing, and the Court denies this motion to strike.

Exclusion of Evidence of Other Disputed Works:

[10] The Defendant seeks to exclude all documents or testimony which refer to works which are not the subject of the current action. In so far as the Defendant seeks a broad ruling barring any such evidence, the Court would deny the motion. In fixing the amount of statutory damages, the jury can consider many factors, including conduct of the Defendant outside the specific works that were infringed. Deterrence is one of the considerations in the determination of statutory damages within the ranges provided by 17 U.S.C. section 504.

[11] In so far as the Defendant specifically seeks to exclude the termination letters dated July 8, 1991, and October 17, 1991, the Court would also deny the motion. The termination letters are relevant to the willfulness of the infringement, regardless of whether they refer to works other than the four television series at issue. The letters put the Defendant on notice of the termination of the licenses, and

informed him that further broadcast of the shows would violate the Plaintiff's copyrights. Those letters should not be excluded.

Motion to Preclude Trial on Statutory Damages:

[12] The Defendant makes a motion in limine "to preclude a trial on statutory damages," arguing that the Supreme Court's opinion in this case invalidated section 504(c) of the Copyright Act. The Defendant contends that if the statute is unconstitutional, the Court does not have the authority to award statutory damages, even if a jury determines the amount. The Defendant asks the Court to hold trial on the issue of actual damages, though the Plaintiff has elected to seek statutory damages.

[13] First, the Court notes that this motion is not a proper motion in limine. The motion should have been brought as a noticed motion to be heard before trial. The Defendant did not file such a motion, nor did he seek leave of the Court to file such a motion. Even if the Court considers the motion, however, the Court would deny the Defendant's motion.

[14] The Supreme Court held in this case that the Seventh Amendment granted a right to a jury trial in the determination of statutory copyright damages. *Feltner v. Columbia Pictures Television*, 118 S.Ct. 1279, 1282 (1998). The Court stated that the statute was silent on the issue of whether the a defendant could demand a jury trial. 118 S.Ct. at 1282. Nowhere in the opinion does the Court explicitly invalidate the statutory damages provision, nor does the Court state that the statute is irreconcilable with the Seventh Amendment. Instead, the Supreme Court remanded the case. 118 S.Ct. at 1288. On remand to the Ninth Circuit, that court in turn remanded the case to the District Court, holding that the Defendant was entitled to a jury determination of statutory damages. *Columbia Pictures Television v. Krypton Broadcasting of Birmingham, Inc.*, 152 F.3d 1171, 1172 (9th Cir. 1998). Accordingly, in the

absence of any indication in the Supreme Court's opinion to the contrary, the Court will hold a jury trial on the issue of the amount of statutory damages.

Motion to Dismiss Suit Based on Standing of Plaintiff:

[15] The Defendant makes a motion in limine to preclude a damages award because the Plaintiff lacks standing and is not the owner of an exclusive right to the works. This motion is untimely. It should have been brought in opposition to the Plaintiff's motion for summary judgment as to liability. The Defendant did not raise this issue at that time. Instead, four months after the Court granted summary judgment, the Defendant filed a "Motion to Vacate Order Granting Summary Judgment." The Court denied that motion because the Defendant has not met the requirements for reconsideration under Local Rule 7.16. The Ninth Circuit affirmed this Court's denial of the motion for reconsideration. *Columbia Pictures Television v. Krypton Broadcasting of Birmingham, Inc.*, 106 F.3d 284, 290. The Ninth Circuit refused to hear the Defendant's standing argument on appeal. The Defendant did not include this issue in the writ of certiorari filed in the Supreme Court.

[16] This issue has already been litigated, and the Court has already found the Defendant barred from making this argument. The Defendant cannot now bring up an argument that this Court and the Ninth Circuit has already rejected.[1]

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[1] The Defendant attempted to frame this issue as one of constitutional standing, which can thus be raised at any time. However, the Defendant really only raises an issue about whether the Plaintiff is authorized under the statute to bring this action. There is not a dispute about whether the Plaintiff suffered injury-in-fact. The question raised by the Defendant is really one of statutory standing, in which they challenge an element of copyright infringement. This issue can be waived if the Defendant does not timely raise it.

Accordingly the Court would deny the Defendant's motion to preclude the Plaintiff from seeking damages.

IT IS SO ORDERED.

IT IS FURTHER ORDERED that the Clerk of the Court shall serve, by United States mail or by telefax, copies of this Order on counsel for the parties in this matter.

Dated: March 31, 1999.

/s/ Edward Rafeedie
EDWARD RAFEEDIE
Senior United States District Judge

APPENDIX C

Supreme Court of the United States

No. 96-1768

C. Elvin FELTNER, Jr., Petitioner,

v.

COLUMBIA PICTURES TELEVISION, INC.

Argued Jan. 21, 1998.
Decided March 31, 1998.

Justice THOMAS delivered the opinion of the Court.

Section 504(c) of the Copyright Act permits a copyright owner "to recover, instead **[**1282]** of actual damages and profits, an award of statutory damages . . . , in a sum of not less than $500 or more than $20,000 as the court considers just." 90 Stat. 2585, as amended, 17 U.S.C. § 504(c)(1). In this case, we consider whether § 504(c) or the Seventh Amendment grants a right to a jury trial when a copyright owner elects to recover statutory damages. We hold that although the statute is silent on the point, the Seventh Amendment provides a right to a jury trial, which includes a right to a jury determination of the amount of statutory damages. We therefore reverse.

I

Petitioner C. Elvin Feltner owns Krypton International Corporation, which in 1990 acquired three television stations in the southeastern United States. Respondent Columbia Pictures Television, Inc., had licensed several television series to these stations, including "Who's the Boss," "Silver Spoons," "Hart to Hart," and "T. J. Hooker." After the stations became

delinquent in making their royalty payments to Columbia, Krypton and Columbia entered into negotiations to restructure the stations' debt. These discussions were unavailing, and Columbia terminated the stations' license [*343] agreements in October 1991. Despite Columbia's termination, the stations continued broadcasting the programs.

Columbia sued Feltner, Krypton, the stations, various Krypton subsidiaries, and certain Krypton officers in federal district court alleging, *inter alia*, copyright infringement arising from the stations' unauthorized broadcasting of the programs. Columbia sought various forms of relief under the Copyright Act of 1976 (Copyright Act), 17 U.S.C. § 101 *et seq.*, including a permanent injunction, § 502; impoundment of all copies of the programs, § 503; actual damages or, in the alternative, statutory damages, § 504; and costs and attorney's fees, § 505. On Columbia's motion, the District Court entered partial summary judgment as to liability for Columbia on its copyright infringement claims.[1]

Columbia exercised the option afforded by § 504(c) of the Copyright Act to recover "Statutory Damages" in lieu of actual damages. In relevant part, § 504(c) provides:

> "STATUTORY DAMAGES –
>
> "(1) Except as provided by clause (2) of this subsection, the copyright owner may elect, at any time before final judgment is rendered, to recover, instead of actual damages and profits, an award of statutory damages for all infringements involved in the action, with respect to any one work, . . . in a sum of not less than $500 or more than $20,000 as the court considers just. . . ."

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[1] During the course of the litigation, Columbia dropped all claims against all parties except its copyright claims against Feltner.

"(2) In a case where the copyright owner sustains the burden of proving, and the court finds, that infringement was committed willfully, the court [in] its discretion may increase the award of statutory damages to a sum of not more than $100,000. In a case where the infringer sustains the burden of proving, and the court finds, that such infringer was not aware and had no reason to believe that his or her acts constituted an infringement of [*344] copyright, the court in its discretion may reduce the award of statutory damages to a sum of not less than $200. . . ." 17 U.S.C. § 504(c).

The District Court denied Feltner's request for a jury trial on statutory damages, ruling instead that such issues would be determined at a bench trial. After two days of trial, the trial judge held that each episode of each series constituted a separate work and that the airing of the same episode by different stations controlled by Feltner constituted separate violations; accordingly, the trial judge determined that there had been a total of 440 acts of infringement. The trial judge further found that Feltner's infringement was willful and fixed statutory damages at $20,000 per act of infringement. Applying that amount to the number of acts of infringement, the trial judge determined that [**1283] Columbia was entitled to $8,800,000 in statutory damages, plus costs and attorney's fees.

The Court of Appeals for the Ninth Circuit affirmed in all relevant respects. *Columbia Pictures Television v. Krypton Broadcasting of Birmingham, Inc.*, 106 F.3d 284 (1997).[2] Most importantly for present purposes, the court rejected Feltner's argument that he was entitled to have a jury determine

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[2] The Court of Appeals vacated and remanded (for further explanation) the District Court's award of costs and attorney's fees to Columbia. See 106 F.3d at 296.

statutory damages. Relying on *Sid & Marty Krofft Television Productions, Inc. v. McDonald's Corp.*, 562 F.2d 1157 (CA9 1977) – which held that § 25(b) of the Copyright Act of 1909, the statutory predecessor of § 504(c), required the trial judge to assess statutory damages[3] – the Court of [*345] Appeals held that § 504(c) does not grant a right to a jury determination of statutory damages. The Court reasoned that "if Congress intended to overrule *Krofft* by having the jury determine the proper award of statutory damages, it would have altered" the language "as the court considers just" in § 504(c). 106 F.3d at 293. The Court of Appeals further concluded that the "Seventh Amendment does not provide a right to a jury trial on the issue of statutory damages because an award of such damages is equitable in nature." *Ibid.* We granted certiorari. 521 U.S. (1997).

II

[1][2] Before inquiring into the applicability of the Seventh Amendment, we must "'first ascertain whether a construction of the statute is fairly possible by which the [constitutional] question may be avoided.'" *Tull v. United States*, 481 U.S. 412, 417, n. 3, 95 L. Ed. 2d 365, 107 S. Ct. 1831 (1987) (quoting *Curtis v. Loether*, 415 U.S. 189, 192, n. 6, 39 L. Ed. 2d 260, 94 S. Ct. 1005 (1974)). Such a construction is not possible here, for we cannot discern "any

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[3] Under the 1909 Act, a copyright plaintiff could recover "in lieu of actual damages and profits, such damages as to the court shall appear to be just, and assessing such damages the court may, in its discretion, allow the amounts as hereinafter stated, but in the case of a newspaper reproduction of a copyrighted photograph, such damages shall not exceed the sum of [$200] nor be less than the sum of [$50], and such damages shall in no other case exceed the sum of [$5,000] nor be less than the sum of [$250] . . ." Act of Mar. 4, 1909, § 25(b), 35 Stat. 1081 (later amended and codified at 17 U.S.C. § 101(b)).

congressional intent to grant . . . the right to a jury trial," 481 U.S. at 417, n. 3, on an award of statutory damages.[4]

The language of § 504(c) does not grant a right to have a jury assess statutory damages. Statutory damages are to be assessed in an amount that "the court considers just." § 504(c)(1). Further, in the event that "the court finds" the infringement was willful or innocent, "the court in its discretion" may, within limits, increase or decrease the amount of **[*346]** statutory damages. § 504(c)(2). These phrases, like the entire statutory provision, make no mention of a right to a jury trial or, for that matter, to juries at all.

[3] The word "court" in this context appears to mean judge, not jury. Cf. *F. W. Woolworth Co. v. Contemporary Arts, Inc.*, 344 U.S. 228, 232, 97 L. Ed. 276, 73 S. Ct. 222 (1952) (referring to the "*judicial* discretion" necessary for "the court's choice between a computed measure of damage and that imputed by" the Copyright Act of 1909) (emphasis added). In fact, the other remedies provisions of the Copyright Act use the term "court" in contexts generally thought to confer authority on a judge, rather than a jury. See, *e.g.*, § 502 ("court ... may ... grant temporary and final injunctions"); § 503(a) ("the court may order the impounding . . . of all copies or phonorecords"); § 503(b) ("as part of a final judgment or decree, the court may order the destruction or other reasonable disposition of all copies **[**1284]** or phonorecords"); § 505 ("[T]he court in its discretion may allow the recovery of full costs" of litigation and

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[4] The Courts of Appeals have unanimously held that § 504(c) is not susceptible of an interpretation that would avoid the Seventh Amendment question. See, *e.g.*, *Cass County Music Co. v. C. H. L. R., Inc.*, 88 F.3d 635, 641 (CA8 1996); *Video Views, Inc. v. Studio 21, Ltd.*, 925 F.2d 1010, 1014 (CA7 1991); *Gnossos Music v. Mitken Inc.*, 653 F.2d 117, 119 (CA4 1981); see also *Oboler v. Goldin*, 714 F.2d 211, 213 (CA2 1983); 4 M. Nimmer & D. Nimmer, Nimmer on Copyright § 14.04[C] (1997).

"the court may also award a reasonable attorney's fee"). In contrast, the Copyright Act does not use the term "court" in the subsection addressing awards of actual damages and profits, see § 504(b), which generally are thought to constitute legal relief. See *Dairy Queen, Inc. v. Wood*, 369 U.S. 469, 477, 8 L. Ed. 2d 44, 82 S. Ct. 894 (1962) (action for damages for trademark infringement "subject to cognizance by a court of law"); see also *Arnstein v. Porter*, 154 F.2d 464, 468 (CA2 1946) (copyright action for damages is "triable at 'law' and by a jury as of right"); *Video Views, Inc. v. Studio 21, Ltd.*, 925 F.2d 1010, 1014 (CA7 1991) ("little question that the right to a jury trial exists in a copyright infringement action when the copyright owner endeavors to prove and recover its *actual* damages"); 4 M. Nimmer & D. Nimmer, Nimmer on Copyright § 12.10[B] (1997) ("beyond dispute that a plaintiff who seeks to recover actual damages is entitled to a jury trial" (footnotes omitted)).

[*347] Feltner relies on *Lorillard v. Pons*, 434 U.S. 575, 585, 55 L. Ed. 2d 40, 98 S. Ct. 866 (1978), in which we held that the Age Discrimination in Employment Act of 1967 (ADEA), 81 Stat. 602, 29 U.S.C. § 621 *et seq.*, provides a statutory right to a jury trial in an action for unpaid wages even though the statute authorizes "the court . . . to grant such legal or equitable relief as may be appropriate," § 626(b). That holding, however, turned on two crucial factors: The ADEA's remedial provisions were expressly to be enforced in accordance with the Fair Labor Standards Act of 1938, as amended, 29 U.S.C. § 101 *et seq.*, which had been uniformly interpreted to provide a right to a jury trial, *Lorillard v. Pons*, 434 U.S. at 580-581; and the statute used the word "legal," which we found to be a "term of art" used in cases "in which legal relief is available and legal rights are determined" by juries, *id.*, at 583. Section 504(c), in contrast, does not make explicit reference to another statute that has been uniformly

interpreted to provide a right to jury trial and does not use the word "legal" or other language denoting legal relief or rights.[5]

We thus discern no statutory right to a jury trial when a copyright owner elects to recover statutory damages. Accordingly, we must reach the constitutional question.

III

[4][5][6][7] The Seventh Amendment provides that "in Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved. ..." U.S. Const., Amdt. 7. Since Justice Story's time, the Court **[*348]** has understood "Suits at common law" to refer "not merely [to] suits, which the *common* law recognized among its old and settled proceedings, but [to] suits in which *legal* rights were to be ascertained and determined, in contradistinction to those where equitable rights alone were recognized, and equitable remedies were administered." *Parsons v. Bedford*, 3 Peters 433, 447 (1830) (emphasis in original). The Seventh Amendment thus applies not only to common-law causes of action, but also to "actions brought to enforce statutory rights that are analogous to common-law causes of action ordinarily decided in English law courts in the late 18th century, as opposed to those customarily heard by courts of equity or admiralty." *Granfinanciera, S. A. v. Nordberg*, 492 U.S. 33, 42, 106 L. Ed. 2d 26, 109 S. Ct. 2782 (1989) (citing *Curtis v. Loether*, 415 U.S. at 193). To determine whether a statutory action is more analogous to cases tried in

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[5] In addition, a copyright plaintiff may elect statutory damages "at any time before final judgment is rendered." § 504(c)(1). The parties agree, and we have found no indication to the contrary, that election may occur even after a jury has returned a verdict on liability and an award of actual damages. It is at least unlikely that Congress intended that a jury, having already made a determination of actual damages, should be reconvened to make a determination of statutory damages.

courts of law than to suits tried in courts of equity or admiralty, we examine both the nature of the statutory action and the remedy sought. See 492 U.S. at 42.

[1285]** Unlike many of our recent Seventh Amendment cases, which have involved modern statutory rights unknown to 18th-century England, see, *e.g.*, *Wooddell v. Electrical Workers*, 502 U.S. 93, 116 L. Ed. 2d 419, 112 S. Ct. 494 (1991) (alleged violations of union's duties under Labor Management Relations Act, 1947, and Labor-Management Reporting and Disclosure Act of 1959); *Granfinanciera v. Nordberg*, *supra* (action to rescind fraudulent preference under Bankruptcy Act); *Tull v. United States*, *supra* (government's claim for civil penalties under Clean Water Act); *Curtis v. Loether*, *supra* (claim under Title VIII of Civil Rights Act of 1968), in this case there are close analogues to actions seeking statutory damages under § 504(c). Before the adoption of the Seventh Amendment, the common law and statutes in England and this country granted copyright owners causes of action for infringement. More importantly, copyright suits for monetary **[*349]** damages were tried in courts of law, and thus before juries.

By the middle of the 17th century, the common law recognized an author's right to prevent the unauthorized publication of his manuscript. See, *e.g.*, *Stationers Co. v. Patentees*, Carter's Rep. 89, 124 Eng. Rep. 842 (C.P. 1666). This protection derived from the principle that the manuscript was the product of intellectual labor and was as much the author's property as the material on which it was written. See *Millar v. Taylor*, 4 Burr 2303, 2398, 98 Eng. Rep. 201, 252 (K. B. 1769) (Mansfield, J.) (common-law copyright derived from principle that "it is just, that an Author should reap the pecuniary Profits of his own ingenuity and Labour"); 1 W. Patry, Copyright Law and Practice 3 (1994). Actions seeking damages for infringement of common-law copyright, like

actions seeking damages for invasions of other property rights, were tried in courts of law in actions on the case. See *Millar v. Taylor, supra*, 2396-2397, 98 Eng. Rep. at 251. Actions on the case, like other actions at law, were tried before juries. See *M'Clenachan v. M'Carty*, 1 U.S. 375, 1 Dall. 375, 378, 1 L. Ed. 183 (C. P. Phila. Cty. 1788); 5 J. Moore, Moore's Federal Practice ¶ 8.11[5] (2d ed. 1996); 1 J. Chitty, Treatise on Pleading and Parties to Actions, at 164 (1892).

In 1710, the first English copyright statute, the Statute of Anne, was enacted to protect published books. 8 Anne ch. 19 (1710). Under the Statute of Anne, damages for infringement were set at "one Penny for every Sheet which shall be found in [the infringer's] custody, either printed or printing, published, or exposed to Sale," half ("one Moiety") to go to the Crown and half to the copyright owner, and were "to be recovered ... by action of Debt, Bill, Plaint, or Information." § 1. Like the earlier practice with regard to common-law copyright claims for damages, actions seeking damages under the Statute of Anne were tried in courts of law. See ***[*350]*** *Beckford* v. *Hood*, 7 T. R. 621, 627, 101 Eng. Rep. 1164, 1167 (K. B. 1798) ("The statute having vested that right in the author, the common law gives the remedy by action on the case for the violation of it") (Kenyon, C. J.).

The practice of trying copyright damages actions at law before juries was followed in this country, where statutory copyright protections were enacted even before adoption of the Constitution. In 1783, the Continental Congress passed a resolution recommending that the States secure copyright protections for authors. See U.S. Copyright Office, Copyright Enactments: Laws Passed in the United States Since 1783 Relating to Copyright, Bulletin No. 3, p. 1 (rev. ed. 1963) (hereinafter Copyright Enactments). Twelve States (all except Delaware) responded by enacting copyright statutes, each of which provided a cause of action for damages, and none of

which made any reference to equity jurisdiction. At least three of these state statutes expressly stated that damages were to be recovered through actions at law, see *id.*, at 2 (in Connecticut, damages for double the value of the infringed copy "to be recovered ... in any court of law in this State"); *id.*, at 17 (in Georgia, similar damages enforceable "in due course of law"); *id.*, at 19 (in New York, similar damages enforceable in "any court of law"), while four others provided that damages would be recovered in an "action of debt," a prototypical action brought in a court of law before a jury. See **[**1286]** F. Maitland, The Forms of Action at Common Law, 357 (1929) (hereinafter Maitland); see Copyright Enactments 4-9 (in Massachusetts, New Hampshire, and Rhode Island, damages enforceable by "action of debt"); *id.*, at 12 (in South Carolina, damages of one shilling per sheet enforceable by "debt, bill, plaint or information"). Although these statutes were short-lived, and hence few courts had occasion to interpret them, the available evidence suggests that the practice was for copyright actions seeking damages to be tried to a jury. See *Hudson & Goodwin v. Patten*, 1 Root 133, 134 **[*351]** (Conn. Super. Ct. 1789) (jury awarded copyright owner # 100 under Connecticut copyright statute).

Moreover, three of the state statutes specifically authorized an award of damages from a statutory range, just as § 504(c) does today. See Copyright Enactments 4 (in Massachusetts, damages of not less than a # 5 and not more than # 3,000); *id.*, at 8 (in New Hampshire, damages of not less than # 5 and not more than # 1,000); *id.*, at 9 (in Rhode Island, damages of not less than # 5 and not more than # 3,000). Although we have found no direct evidence of the practice under these statutes, there is no reason to suppose that such actions were intended to deviate from the traditional practice: The damages were to be recovered by an "action of debt," see *id.*, at 4-9, which was an action at law, see Maitland 357.

In 1790, Congress passed the first federal copyright statute, the Copyright Act of 1790, which similarly authorized the awarding of damages for copyright infringements. Act of May 31, 1790, ch. 15, §§ 2, 6, 1 Stat. 124, 125. The Copyright Act of 1790 provided that damages for copyright infringement of published works would be "the sum of fifty cents for every sheet which shall be found in [the infringer's] possession, . . . to be recovered by action of debt in any court of record in the United States, wherein the same is cognizable." § 2. Like the Statute of Anne, the Copyright Act of 1790 provided that half ("one moiety") of such damages were to go to the copyright owner and half to the United States. For infringement of an unpublished manuscript, the statute entitled a copyright owner to "all damages occasioned by such injury, to be recovered by a special action on the case founded upon this act, in any court having cognizance thereof." § 6.

There is no evidence that the Copyright Act of 1790 changed the practice of trying copyright actions for damages in courts of law before juries. As we have noted, actions on the case and actions of debt were actions at law for which a [*352] jury was required. See *supra*, at 9, 11.[6] Moreover, actions to recover damages under the Copyright Act of 1831–which differed from the Copyright Act of 1790 only in the amount (increased to $1 from 50 cents) authorized to be recovered for certain infringing sheets–were consistently tried to juries. See,

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[6] The Copyright Act of 1790 did not provide for equitable remedies at all, and in *Stevens v. Gladding*, 58 U.S. 447, 17 HOW 447, 15 L. Ed. 155 (1855), we held that, even after Congress had provided for equity jurisdiction under the Copyright Act, see Act of Feb. 15, 1819, ch. 19, 3 Stat. 481, the statute's damages provision could not be enforced through a suit in equity. *Id.*, at 455; see also *Callaghan v. Myers*, 128 U.S. 617, 663, 32 L. Ed. 547, 9 S. Ct. 177 (1888) (*Stevens v. Gladding* determined that "the penalties given by § 7 of the copyright act of 1831 cannot be enforced in a suit in equity").

e.g., *Backus v. Gould*, 48 U.S. 798, 7 HOW 798, 802, 12 L. Ed. 919 (1849) (jury awarded damages of $2,069.75); *Reed v. Carusi*, 1 Taney 72, *20 F. Cas. 431, 432* (No. 11,642) (CCMd. 1845) (jury awarded damages of $200); *Millett v. Snowden*, 17 F. Cas. 374, 375 (SDNY 1844) (jury awarded damages of $625); *Dwight v. Appleton*, 8 F. Cas. 183, 185 (SDNY 1843) (jury awarded damages of $2,000).

Columbia does not dispute this historical evidence. In fact, Columbia makes no attempt to draw an analogy between an action for statutory damages under § 504(c) and *any* historical cause of action–including those actions for monetary relief that we have characterized as equitable, such as actions for disgorgement of improper profits. See *Teamsters v. Terry*, 494 U.S. 558, 570-571, 108 L. Ed. 2d 519, 110 S. Ct. 1339 (1990); *Tull v. United States*, 481 U.S. at 424. Rather, Columbia merely contends that statutory damages are clearly equitable in nature.

[1287]** [8][9] We are not persuaded. We have recognized the "general rule" that monetary relief is legal, *Teamsters v. Terry, supra*, at 570, and an award of statutory damages may serve purposes traditionally associated with legal relief, such as compensation and punishment. See *Curtis v. Loether*, 415 U.S. at 196 (actual damages are "traditional form of relief offered in the courts of law"); *Tull v. United States, supra*, at 422 **[*353]** ("Remedies intended to punish culpable individuals . . . were issued by courts of law, not courts of equity"). Nor, as we have previously stated, is a monetary remedy rendered equitable simply because it is "not fixed or readily calculable from a fixed formula." 481 U.S. at 422, n. 7. And there is historical evidence that cases involving discretionary monetary relief were tried before juries. See, *e.g.*, *Coryell v. Colbaugh*, 1 N.J.L. 77 (1791) (jury award of "exemplary damages" in an action on a promise of marriage). Accordingly, we must conclude that the Seventh Amendment

provides a right to a jury trial where the copyright owner elects to recover statutory damages.

The right to a jury trial includes the right to have a jury determine the *amount* of statutory damages, if any, awarded to the copyright owner. It has long been recognized that "by the law the jury are judges of the damages." *Lord Townshend v. Hughes*, 2 Mod. 150, 151, 86 Eng. Rep. 994, 994-995 (C. P. 1677). Thus in *Dimick v. Schiedt*, 293 U.S. 474, 79 L. Ed. 603, 55 S. Ct. 296 (1935), the Court stated that "the common law rule as it existed at the time of the adoption of the Constitution" was that "in cases where the amount of damages was uncertain[,] their assessment was a matter so peculiarly within the province of the jury that the Court should not alter it." *Id.*, at 480 (internal quotation marks and citations omitted). And there is overwhelming evidence that the consistent practice at common law was for juries to award damages. See, *e.g.*, *Duke of York v. Pilkington*, 2 Show. 246, 89 Eng. Rep. 918 (K. B. 1760) (jury award of # 100,000 in a slander action); *Wilkes v. Wood, Lofft* 1, 19, 98 Eng. Rep. 489, 499 (K. B. 1763) (jury award of #1,000 in an action of trespass); *Huckle* v. *Money*, 2 Wils. 205, 95 Eng. Rep. 768 (K. B. 1763) (upholding jury award of #300 in an action for trespass, assault and imprisonment); *Genay v. Norris*, 1 S.C. L. 6, 7 (1784) (jury award of #400); *Coryell v. Colbaugh*, *supra* (sustaining correctness of jury award of exemplary damages in an action on a promise of marriage); see also K. Redden, Punitive Damages [*354] § 2.2, p. 27 (1980) (describing "primacy of the jury in the awarding of damages").

More specifically, this was the consistent practice in copyright cases. In *Hudson & Goodwin v. Patten*, 1 Root at 134, for example, a jury awarded a copyright owner #100 under the Connecticut copyright statute, which permitted damages in an amount double the value of the infringed copy. In addition, juries assessed the amount of damages under the Copyright Act

of 1831, even though that statute, like the Copyright Act of 1790, fixed damages at a set amount per infringing sheet. See *Backus v. Gould*, *supra*, at 802 (jury awarded damages of $2,069.75); *Reed* v. *Carusi*, *supra*, at 432 (same, but $200); *Dwight v. Appleton*, *supra*, at 185 (same, but $2,000); *Millett v. Snowden*, *supra*, at 375 (same, but $625).

Relying on *Tull v. United States*, *supra*, Columbia contends that the Seventh Amendment does not provide a right to a jury determination of the amount of the award. In *Tull*, we held that the Seventh Amendment grants a right to a jury trial on all issues relating to liability for civil penalties under the Clean Water Act, 33 U.S.C. §§ 1251, 1319(d), [7] see 481 U.S. at 425, but then went on to decide that Congress could constitutionally authorize trial judges to assess the amount of the civil penalties, see 481 U.S. at 426-427.[8] According to Columbia, **[**1288]** *Tull* demonstrates that a jury determination of the amount of statutory damages is not necessary "to preserve 'the substance of the common-law right of trial by jury.'" 481 U.S. at 426 (quoting *Colgrove v. Battin*, 413 U.S. 149, 157, 37 L. Ed. 2d 522, 93 S. Ct. 2448 (1973)).

[*355] In *Tull*, however, we were presented with no evidence that juries historically had determined the amount of

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[7] Section 1319(d) of the Clean Water Act provided that violators of certain sections of the Act "shall be subject to a civil penalty not to exceed $10,000 per day" during the period of the violation. 481 U.S. at 414.

[8] This portion of our opinion was arguably dicta, for our holding that there was a right to a jury trial on issues relating to liability required us to reverse the lower court's liability determination.

civil penalties to be paid to the Government.[9] Moreover, the awarding of civil penalties to the Government could be viewed as analogous to sentencing in a criminal proceeding. See 481 U.S. at 428 (SCALIA, J., concurring in part and dissenting in part).[10] Here, of course, there is no similar analogy, and there is clear and direct historical evidence that juries, both as a general matter and in copyright cases, set the amount of damages awarded to a successful plaintiff. *Tull* is thus inapposite. As a result, if a party so demands, a jury must determine the actual amount of statutory damages under § 504(c) in order "to preserve 'the substance of the common-law right of trial by jury.'" 481 U.S. at 426.

* * *

For the foregoing reasons, we hold that the Seventh Amendment provides a right to a jury trial on all issues pertinent to an award of statutory damages under § 504(c) of the Copyright Act, including the amount itself. The judgment below is reversed, and we remand the case for proceedings consistent with this opinion.

It is so ordered.

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[9] It should be noted that *Tull* is at least in tension with *Bank of Hamilton v. Lessee of Dudley*, 2 Pet. 492 (1829), in which the Court held in light of the Seventh Amendment that a jury must determine the amount of compensation for improvements to real estate, and with *Dimick v. Schiedt*, 293 U.S. 474, 79 L. Ed. 603, 55 S. Ct. 296 (1935), in which the Court held that the Seventh Amendment bars the use of additur.

[10] As we have noted, even under the Statute of Anne and the Copyright Act of 1790, the amount awarded to the Government ("one Moiety") was determined by a jury.

JUSTICE SCALIA, concurring in the judgment.

It is often enough that we must hold an enactment of Congress to be unconstitutional. I see no reason to do so here – **[*356]** not because I believe that jury trial is not constitutionally required (I do not reach that issue), but because the statute can and therefore should be read to provide jury trial.

"[W]here a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter." *United States ex rel. Attorney General v. Delaware & Hudson Co.*, 213 U.S. 366, 408, 53 L. Ed. 836, 29 S. Ct. 527 (1909). The Copyright Act of 1976 authorizes statutory damages for copyright infringement "in a sum of not less than $500 or more than $20,000 as the court considers just." 17 U.S.C. § 504(c). The Court concludes that it is not "fairly possible," *ante*, at 4 (internal quotation marks omitted), to read § 504(c) as authorizing jury determination of the amount of those damages. I disagree.

In common legal parlance, the word "court" can mean "[t]he judge or judges, as distinguished from the counsel or jury." Webster's New International Dictionary 611 (2d ed. 1949) (def. 10d). But it also has a broader meaning, which includes both judge and jury. See, *e.g.*, *id.*, (def. 10b: "The persons duly assembled under authority of law for the administration of justice"); Black's Law Dictionary 318 (5th ed. 1979) (". . . A body organized to administer justice, and including both judge and jury"). We held in *Lorillard v. Pons*, 434 U.S. 575, 55 L. Ed. 2d 40, 98 S. Ct. 866 (1978), that a statute authorizing "the court . . . to grant such legal or equitable relief as may be appropriate," 29 U.S.C. § 626(b), could fairly be read to afford a right to jury trial on claims for

backpay under the Age Discrimination in Employment Act of 1967.

As the Court correctly observes, *ante*, at 6, there was more evidence in *Lorillard* than there is in the present case that "court" [**1289] was being used to include the jury. The remedial provision at issue explicitly referred to the "'powers, remedies, and *procedures*'" of the Fair Labor Standards Act, under which "it was well established that there was a right to a jury trial," *Lorillard*, 434 U.S. at 580. The provision's [*357] reference to "legal ... relief" also strongly suggested a statutory right to jury trial. *Id.*, at 583. The text of § 504(c) lacks such clear indications that "court" is being used in its broader sense. But their absence hardly demonstrates that the broader reading is not "fairly possible," *e.g.*, *Tull v. United States*, 481 U.S. 412, 417, n. 3, 95 L. Ed. 2d 365, 107 S. Ct. 1831 (1987). The only significant evidence cited by the Court for *that* proposition is that the "Copyright Act use[s] the term 'court' in contexts generally thought to confer authority on a judge, rather than a jury," *ante*, at 5, but "does not use the term 'court' in the subsection addressing awards of actual damages and profits, see § 504(b), which generally are thought to constitute legal relief," *ante*, at 5-6. That is a fair observation, but it is not, in my view, probative enough to compel an interpretation that is constitutionally doubtful.

That is at least so in light of contradictory evidence from the statutory history, which the Court chooses to ignore. Section 504(c) is the direct descendant of a remedy created for unauthorized performance of dramatic compositions in an 1856 copyright statute. That statute provided for damages "not less than one hundred dollars for the first, and fifty dollars for every subsequent performance, as to the court having cognizance thereof shall appear to be just," enforced through an "action on the case or other equivalent remedy." Act of Aug. 18, 1856, ch. 169, 11 Stat. 138, 139. Because actions on the case were

historically tried at law, it seems clear that this original statute permitted juries to assess such damages. See *Lorillard*, *supra*, at 583. Although subsequent revisions omitted the reference to "action[s] on the case," they carried forward the language specifying damages "as to the court shall appear to be just." See Act of July 8, 1870, ch. 230, § 101, 16 Stat., 214; Act of January 6, 1897, ch. 4, 29 Stat., 482. In 1909, Congress extended those provisions to permit all copyright owners to recover "in lieu of actual damages and profits such damages as to the court shall appear just ...." Act of March 4, 1909, ch. 320, § 25(b), [*358] 35 Stat. 1081. We have recognized that, although the prior statutory damages provisions

> "were broadened [in 1909] so as to include other copyrights and the limitations were changed in amount, ... the principle on which they proceeded – that of committing the amount of damages to be recovered to the court's discretion and sense of justice, subject to prescribed limitations – was retained. The new provision, like one of the old, says the damages shall be such 'as to the court shall appear to be just.'" *L. A. Westermann Co. v. Dispatch Printing Co.*, 249 U.S. 100, 107, 63 L. Ed. 499, 39 S. Ct. 194 (1919).

If a right to jury trial was consistent with the meaning of the phrase "as to the court . . . shall appear to be just" in the 1856 statutory damages provision, I see no reason to insist that the phrase "as the court considers just" has a different meaning in that provision's latest reenactment. "[W]here, as here, Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute." *Lorillard*, 434 U.S. at 581.

I do not contend that reading "court" to include "jury" is necessarily the *best* interpretation of this statutory text. The Court is perhaps correct that the indications pointing to a change in meaning from the 1856 statute predominate. As I have written elsewhere, however:

> "The doctrine of constitutional doubt does not require that the problem-avoiding construction be the *preferable* one – the one the Court would adopt in any event. Such a standard would deprive the doctrine of all function. 'Adopt the interpretation that avoids the constitutional doubt if that is the right one' produces precisely the same result as 'adopt the right interpretation.' Rather, the doctrine of constitutional doubt **[**1290]** comes into play when the statute is 'susceptible of' the problem-avoiding **[*359]** interpretation, *Delaware & Hudson Co.*, 213 U.S. at 408 – when that interpretation is *reasonable*, though not necessarily the best." *Almendarez-Torres v. United States*, 523 U.S. 224, 270 (SCALIA, J., dissenting).

As the majority's discussion amply demonstrates, there would be considerable doubt about the constitutionality of § 504(c) if it did not permit jury determination of the amount of statutory damages. Because an interpretation of § 540(c) that avoids the Seventh Amendment question is at least "fairly possible," I would adopt that interpretation, prevent the invalidation of this statute, and reserve the constitutional issue for another day.

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

COLUMBIA PICTURES TELEVISION,
Plaintiff-Appellee,

v.

KRYPTON BROADCASTING OF BIRMINGHAM, INC.; WABM BIRMINGHAM; KRYPTON BROADCASTING, INC.; KRYPTON INTERNATIONAL CORPORATION; WTWV, INC.; WTVX; DANIEL S. DAYTON; ALFRED F. DECUR,
Defendants,

and

C. ELVIN FELTNER, JR.,
Defendant-Appellant.

Nos. 94-55816
94-55894

D.C. No.
CV-91-06847-ER

OPINION

Appeal from the United States District Court
for the Central District of California
Edward Rafeedie, District Judge, Presiding

Argued and Submitted
November 15, 1995—Pasadena, California

Filed February 6, 1997

Before: Jerome Farris, Melvin Brunetti, and Alex Kozinski,
Circuit Judges.

Opinion by Judge Brunetti

OPINION

BRUNETTI, Circuit Judge:

C. Elvin Feltner is the owner of Krypton International Corporation, which in turn owns three television stations in the southeast.[1] Columbia Pictures Television licensed several television shows to the three stations, including "Who's the Boss?," "Silver Spoons," "Hart to Hart," and "T.J. Hooker." After the stations became delinquent in paying royalties, Columbia attempted to terminate the licensing agreements. The stations continued to broadcast the programs, and Columbia filed suit. During the course of the litigation, Columbia dropped all causes of action except its copyright claims against Feltner. The district court found Feltner vicariously and contributorily liable for copyright infringement on the part of the Krypton defendants, granted summary judgment in favor of Columbia on liability, and, after a bench trial, awarded Columbia $8,800,000 in statutory damages and over $750,000 in attorneys fees and costs. In this appeal, Feltner and Krypton International[2] challenge several of the district court's rulings.

I. SUBJECT MATTER JURISDICTION

Feltner argues that Columbia's complaint fails to properly plead a claim arising under federal copyright law. Therefore, argues Feltner, subject matter jurisdiction was lacking in the district court. However, because Columbia's complaint alleges ownership and infringement of multiple copyrights and seeks relief under several sections of the Copyright Act—

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[1]Krypton International and its subsidiaries—Krypton Broadcasting, Inc.; Krypton Broadcasting of Birmingham, Inc.; Krypton Broadcasting of Jacksonville, Inc.; and Krypton Broadcasting of Ft. Pierce, Inc.—are collectively referred to as "the Krypton defendants."

[2]Krypton International is only appealing the district court's dismissal of its counterclaims and the district court's denial of its motion for fees.

17 U.S.C. §§ 502 (injunction), 503 (impoundment), 504 (damages and profits), and 505 (costs and attorneys fees)—Columbia properly pled a claim arising under federal copyright law. *Rano v. Sipa Press, Inc.*, 987 F.2d 580, 584 (9th Cir. 1993); *Vestron, Inc. v. Home Box Office, Inc.*, 839 F.2d 1380, 1381-82 (9th Cir. 1988); *Effects Assocs., Inc. v. Cohen*, 817 F.2d 72, 73-74 (9th Cir. 1987). The district court had subject matter jurisdiction pursuant to 28 U.S.C. § 1338(a).

II. VENUE

Feltner argues that venue was improper in the Central District of California. So long as the underlying facts are not in dispute, we review the district court's venue determination de novo. *Decker Coal Co. v. Commonwealth Edison Co.*, 805 F.2d 834, 841 (9th Cir. 1986). The district court's factual findings must be accepted unless clearly erroneous. *See Reebok Int'l, Ltd. v. McLaughlin*, 49 F.3d 1387, 1390 (9th Cir.), *cert. denied*, 116 S.Ct. 276 (1995). We find that venue was proper in the Central District.

Venue under 28 U.S.C. § 1400(a)[3] is proper in any judicial district in which the defendant would be amenable to personal jurisdiction if the district were a separate state. *Milwaukee Concrete Studios v. Fjeld Manufacturing Co.*, 8 F.3d 441, 445-47 (7th Cir. 1993); *Johannsen v. Brown*, 788 F.Supp. 465, 469 (D.Or. 1992).

[1] Columbia contends that specific jurisdiction exists over Feltner. We use a three part test for analyzing whether the exercise of specific jurisdiction satisfies the requirements of due process:

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[3]28 U.S.C. § 1400 provides:

> Civil actions, suits, or proceedings arising under any Act of Congress relating to copyrights or exclusive rights in mask works may be instituted in the district in which the defendant or his agent resides or may be found.

(1) the defendant must purposefully avail himself of the privilege of conducting activities in the forum, thereby invoking the benefits and protections of its laws;

(2) the claim must arise out of or result from the defendant's forum-related activities; and

(3) the exercise of jurisdiction must be reasonable.

Sher v. Johnson, 911 F.2d 1357, 1361 (9th Cir. 1990).

[2] Columbia alleged, and the district court found, that Feltner willfully infringed copyrights owned by Columbia, which, as Feltner knew, had its principal place of business in the Central District. This fact alone is sufficient to satisfy the "purposeful availment" requirement. *Calder v. Jones*, 465 U.S. 783, 789-90 (1984) (holding that an intentional tort knowingly directed at a forum resident satisfies the minimum contacts test).

[3] Additionally, Columbia relies on Feltner's wide-ranging contract-related contacts with Columbia in the Central District. Feltner argues that these contacts cannot support venue because they all arise out of the license agreements which, according to Feltner, are unenforceable because they were never signed by Columbia. This argument fails both because Feltner did not raise this argument in the district court and because whether or not the agreements are enforceable as a matter of contract law, Feltner's contacts with the Central District remain the same. Feltner's contract-related contacts are sufficient to satisfy the "purposeful availment" requirement. *See Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476, 479 (1985) (holding in contract action that, when one analyzes the "prior negotiations and contemplated future consequences, along with the terms of the contract and the parties' actual course of dealing," the purposeful availment

requirement is satisfied if a defendant has created "continuing obligations between himself and residents of the forum").

[4] Under the second prong, Columbia's claims clearly "arise out of or result from the defendant's forum-related activities." As correctly asserted by Columbia, Feltner was able to authorize infringing broadcasts of Columbia's programs only because Columbia shipped those programs from the Central District to the Krypton stations pursuant to the license agreements.

[5] Finally, under the third prong, "there is a *presumption of reasonableness* upon a showing that the defendant purposefully directed his actions at forum residents which the defendant bears the burden of overcoming by presenting a compelling case that jurisdiction would be unreasonable." *Haisten v. Grass Valley Medical Reimbursement*, 784 F.2d 1392, 1397 (9th Cir. 1986) (citing *Burger King*, 471 U.S. at 477) (emphasis in original). Feltner's contentions—that he had more of a burden litigating in California than Columbia would have had in Florida, that Florida had a stronger interest than California in adjudicating the suit because he lived in Florida, and that Florida was the most efficient forum—are insufficient to meet his burden.

Because Feltner would be amenable to personal jurisdiction in the Central District if the Central District were a separate state, venue was proper under 28 U.S.C. § 1400(a).[4]

III. SUMMARY JUDGMENT

Feltner contends that summary judgment was inappropriately granted because: (A) Columbia was not the proper party

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[4]The district court also relied on the license agreements' forum selection clauses to confer venue. While we agree with the district court that the forum selection clauses were appropriately enforced against Feltner, we need not analyze the issue here.

to the copyright claims; (B) there was a triable issue of fact as to whether Columbia's termination of the license agreements was proper; (C) there was a triable issue of fact as to whether Feltner would reasonably have interpreted Columbia's actions as terminating the license agreements; and (D) triable issues of fact existed concerning Feltner's allegations that Columbia was precluded from terminating the agreements on the basis of estoppel, negligent misrepresentation, and an oral contract not to terminate. None of Feltner's contentions has merit.

A. Feltner's Standing Argument Is Not Properly Before This Court.

Feltner argues that the district court's summary judgment ruling was erroneous because, under 17 U.S.C. § 501(b), Columbia was not the proper party to the copyright claims. Feltner never raised this argument in his opposition to Columbia's summary judgment motion. In fact, in his "Statement of Genuine Issues," Feltner agreed that "Columbia holds the copyright to each . . . episode" at issue. While Feltner now contends that the issue was "raised in a Motion to Vacate filed under F.R.Civ.P. 60(b)," this contention is not supported by the record: The district court denied Feltner's motion for leave to file the motion to vacate, impliedly finding that Feltner had failed to meet the prerequisites for relief under F.R.Civ.P. 60(b) and Central District Local Rule 7.16.

A district court's decision not to consider an argument raised for the first time on reconsideration is reviewed for abuse of discretion. *Rosenfeld v. United States Dept. of Justice*, 57 F.3d 803, 811 (9th Cir. 1995). Because Feltner has failed to demonstrate that the district court abused its discretion in refusing to consider his motion to vacate, Feltner's standing argument may not be considered on appeal.

B. Columbia's Termination Was Proper.

Feltner argues that a triable issue of fact exists as to whether the defendants' breach of the license agreements was

sufficiently material to enable Columbia to terminate the agreements. In support of his argument, Feltner cites *Rano v. Sipa Press, Inc.*, 987 F.2d at 586-87, and *Fantasy, Inc. v. Fogarty*, 984 F.2d 1524, 1529-31 (9th Cir. 1993), *rev'd on other grounds*, 114 S.Ct. 1023 (1994), which held that the licensing agreement at issue was not rightfully terminated because the licensee's breach did not "go to the root of the matter," *Fantasy*, 984 F.2d at 1530 (citations omitted), or did not "constitute a total failure in the performance of the contract." *Rano*, 987 F.2d at 586 (citation and internal quotation omitted).

[6] However, both *Rano* and *Fantasy* dealt with licensing agreements that did not have an express contractual provision authorizing termination. *See Rano*, 987 F.2d at 583; *Fantasy*, 984 F.2d at 1529. In contrast, each of the license agreements in this case has an express provision authorizing Columbia to terminate the agreement if the licensee "fails to make payments of the License Fee or any portion thereof when due." Because these agreements expressly consider the failure to timely pay royalties material, Columbia's termination of the agreements was proper. *See Fantasy*, 984 F.2d at 1529 (stating that "a bona fide dispute concerning royalty payments does not automatically constitute a material breach *unless the contract so provides*") (emphasis added and omitted).

C. Feltner Could Not Reasonably Interpret Columbia's Actions as Anything But Termination.

Feltner's version of the facts surrounding the termination of the licensing agreements is as follows: In 1989, Feltner began negotiations to purchase WNFT-TV in Jacksonville, Florida. Because he determined that the station needed to cut expenses to operate profitably, he instructed Dan Dayton, his Chief Operating Officer, to negotiate with all of the syndicators supplying programs to WNFT to see if they would be willing to restructure the license agreements. In this regard, Dayton contacted John Darakjy of Columbia, who indicated that Colum-

bia would "work with" Krypton to restructure the deal. Dayton memorialized this conversation in a March 22, 1990 letter.

Feltner thereafter purchased WNFT, as well as stations WABM-TV in Birmingham, Alabama and WTVX-TV in West Palm Beach, Florida. From March 1990 until Columbia filed its lawsuit in December of 1991, Columbia and the Krypton entities engaged in protracted negotiations for the restructure of each of the three stations' debt to Columbia. During that time, at least thirteen written proposals of restructure were exchanged—six from Columbia and seven from Krypton. The parties were unable to reach an agreement "primarily because Columbia insisted upon a large up-front payment and refused to spread out the payments over the entire term of the contract notwithstanding defendants' protests that the stations were not earning enough money to make those payments."

On July 8, 1991, Columbia sent the first of three purported termination letters.[5] Despite the letter's threatening language, Columbia made no attempts to enforce the letter's demands and sent three more restructure proposals in September and October of 1991. On October 17, 1991, Columbia sent another termination letter similar to the letter of July 8. Like the July 8 letter, the October 17 letter was subsequently contradicted by a restructure proposal sent on December 10, 1991.

Based on these facts, Feltner argues that a triable issue of fact exists as to whether he should have reasonably interpreted Columbia's conduct to effectuate a termination of the licensing agreements. In particular, Feltner cites to the ambiguity caused by the restructuring proposals sent by

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[5]The letter demanded that WNFT cease and desist from the broadcast of the formerly-licensed programs and demanded the immediate accelerated payment of $2,733,644.18.

Columbia after the purported termination letters of July 8 and October 17 and the inconsistency of the July 8 and October 17 letters' simultaneous demands of full accelerated payment and termination of the license agreements.

[7] Feltner's arguments are unavailing. Both the July 8 and October 17 letters are clear and unequivocal. While Feltner argues that the October 17 letter was rendered ambiguous by the letter of December 10, the December 10 letter clearly indicates that it was sent "in the interest of resolving Columbia's claims without resorting to litigation," and that if Krypton "continu[ed] its deliberate campaign of copyright infringement," Columbia would file a lawsuit. Nor could the other restructure proposals be interpreted as anything other than last-ditch efforts to strike a deal.

[8] Likewise, the October 17 letter was not rendered ambiguous by the simultaneous exercise of the acceleration and termination provisions. The contract clearly indicates that in the event of a failure to pay royalties, Columbia could terminate the agreement *and* would be immediately entitled to "the entire unpaid balance of the license fee." Thus, the October 17 letter's exercise of both the acceleration provision and termination provision could not reasonably be interpreted as ambiguous.

D. Feltner's Defenses Fail as a Matter of Law.

In his reply brief to this court, Feltner argues that, despite the apparent termination, there was nevertheless a triable issue of material fact concerning whether Columbia was precluded from terminating on the basis of estoppel, negligent misrepresentation, or an oral contract not to terminate. Feltner's evidence fails to raise a triable issue of fact as to any of these defenses.

[9] A claim of promissory estoppel requires, among other things, "a promise clear and unambiguous in its terms," and

injury caused by the promisee's reasonable reliance on the promise. *Laks v. Coast Federal Sav. & Loan Ass'n*, 131 Cal.Rptr. 836, 839 (Ct. App. 1976). The only "promise" that could reasonably be inferred from Feltner's evidence was a promise by Columbia to "work with" Krypton. However, this is not a "clear and unambiguous" promise, for it clearly contemplated further negotiations to finalize the terms of the restructure. *Id.* Furthermore, to the extent it was an adequate promise, Feltner was not injured because Columbia performed the promise by negotiating extensively from March 1990 until December 1991. Thus, Feltner's promissory estoppel claim must fail.

Feltner's negligent misrepresentation claim is similarly defective. Negligent misrepresentation is "a statement made for the guidance of others which is not warranted by the information of the person making it." *Grenell v. City of Hermosa Beach*, 163 Cal.Rptr. 315, 319 (Ct. App. 1980); *see* Cal. Civ. Code § 1572(2). Although Feltner argued in the district court that Columbia had already restructured the license agreement with Krypton's predecessor and that Columbia's practice was not to undertake subsequent restructures of licenses that had already been restructured, Feltner has failed to present sufficient evidence for a reasonable jury to conclude that this was in fact Columbia's practice. Thus, Feltner has failed to raise a triable issue of fact on his negligent misrepresentation claim.

[10] Lastly, Feltner's breach of oral contract claim is properly dismissed on summary judgment. "An agreement to make in the future such a contract as may be agreed upon at a later time amounts to nothing, is not binding, and cannot be made the basis of a cause of action." *Forgeron Inc. v. Hansen*, 308 P.2d 406, 411 (Cal. Ct. App. 1957) (quoting 12 Cal.Jur.2d, Contracts, § 111); *accord Kruse v. Bank of America*, 248 Cal.Rptr. 217, 229 (Ct. App. 1988), *cert. denied*, 488 U.S. 1043 (1989). Because the facts presented by Feltner indicate, at best, an agreement to negotiate in the future, Feltner

has failed to raise a triable issue of fact on his oral contract claim.[6]

In sum, Feltner failed to raise a triable issue of material fact as to whether Columbia validly terminated the license agreements by October 17, 1991. Summary judgment against Feltner for copyright infringements occurring after that date was therefore proper.

IV. COURT TRIAL ON STATUTORY DAMAGES

[11] Section 504(c)(1) of the Act allows a copyright holder to elect statutory damages in lieu of actual damages. If statutory damages have been elected, and a defendant is found to have infringed, damages are to be awarded "in a sum of not less than $500 or more than $20,000 as the court considers just." 17 U.S.C. § 504(c)(1). Additionally, if the "court finds . . . that infringement was committed willfully, the court in its discretion may increase the award of statutory damages to a sum of not more than $100,000," and if the court finds that the infringement was committed innocently "the court [in] its discretion may reduce the award of statutory damages to a sum of not less than $200." *Id.* § 504(c)(2). Columbia elected statutory damages. Over Feltner's objection, the district court held a bench trial on damages, found Feltner's infringement to be willful, and fixed the statutory damages at $20,000 per violation.

Feltner argues that the district court's denial of his request for a jury trial on the issue of statutory damages was erroneous, both as a matter of statutory interpretation and because

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[6]While Feltner raises the claims of promissory estoppel, negligent misrepresentation, and breach of oral contract as defenses to Columbia's copyright claim, the Krypton defendants argued these theories as part of a counterclaim filed against Columbia. As the above discussion makes clear, the district court properly granted summary judgment in favor of Columbia on the Krypton defendants' counterclaims.

it deprived him of his Seventh Amendment right to a jury trial. We reject Feltner's argument.

[12] In *Sid & Marty Krofft Television v. McDonald's Corp.*, 562 F.2d 1157 (9th Cir. 1977), we interpreted the analogous statutory damages provision of the 1909 Copyright Act and held that the amount of statutory damages "is properly addressed to the court, not the jury." *Id.* at 1177. In so holding, the court relied on the statute's language, which provided for the award of "such damages as *to the court* shall appear to be just." *Id.* at 1177 n. 5 (quoting 17 U.S.C. § 101(b)) (emphasis added). The *Krofft* court reasoned: "The jury plays no role in this determination, because 'the *court*'s conception of what is just in the particular case, considering the nature of the copyright, the circumstances of the infringement, and the like, is made the measure of the damages to be paid. . . .' " *Id.* at 1177 (quoting *Westermann Co. v. Dispatch Printing Co.*, 249 U.S. 100, 106 (1919)) (emphasis in original).

Feltner argues that *Krofft* is distinguishable because the 1909 Act, interpreted by *Krofft*, gave the court the option of awarding "in lieu" (statutory) damages while the 1976 Act gives the option to elect statutory damages to the plaintiff. However, *Krofft*'s rationale is equally applicable to § 504 of the 1976 Act. Section 504(c)(1) of the 1976 Act, like § 101(b) of the 1909 Act, provides for the award of such damages (within fixed limits) "as the court considers just." 17 U.S.C. § 504(c)(1). If Congress intended to overrule *Krofft* by having the jury determine the proper award of statutory damages, it would have altered this language.

[13] As for Feltner's contention that the district court's ruling deprived him of his Seventh Amendment right to a jury trial, we agree with those cases holding that the Seventh Amendment does not provide a right to a jury trial on the issue of statutory damages because an award of such damages is equitable in nature. *See Cable/Home Communication v. Network Prods., Inc.*, 902 F.2d 829, 852-53 (11th Cir. 1990);

Oboler v. Goldin, 714 F.2d 211, 213 (2d Cir. 1983); *Twentieth Century Music Corp. v. Frith*, 645 F.2d 6, 7 (5th Cir. 1981); *Raydiola Music v. Revelation Rob, Inc.*, 729 F.Supp. 369 (D.Del. 1990); *cf. Video Views, Inc. v. Studio 21, Ltd.*, 925 F.2d 1010, 1014-16 (7th Cir.), *cert. denied*, 502 U.S. 861 (1991) (holding that the amount of statutory damages is decided by the court but the issue of willfulness should be tried to the jury). *But see Cass County Music Co. v. C.H.L.R., Inc.*, 88 F.3d 635 (8th Cir. 1996) (holding that Seventh Amendment provides right to have jury assess statutory damages); *Gnossos Music v. Mitken, Inc.*, 653 F.2d 117, 119-21 (4th Cir. 1981) (same); *Educational Testing Services v. Katzman*, 670 F.Supp. 1237 (D.N.J. 1987) (same). *See generally* 3 M. Nimmer & D. Nimmer, *Nimmer on Copyright* § 14.04[C] (1995) (listing cases and describing those cases allocating decision to judge as "the better view").

The district court properly denied Feltner's request for a jury trial on the issue of statutory damages.

V. WILLFULNESS FINDING

[14] "Willful" within the meaning of § 504(c)(2) means "with knowledge that the defendant's conduct constitutes copyright infringement." *Peer Int'l Corp. v. Pausa Records, Inc.*, 909 F.2d 1332, 1335 n.3 (9th Cir. 1990) (quoting 3 *Nimmer on Copyright* § 1404[B], at 14-40.2-.3 (1989)), *cert. denied*, 498 U.S. 1109 (1991). "To refute evidence of willful infringement, [the defendant] must not only establish its good faith belief in the innocence of its conduct, it must also show that it was reasonable in holding such a belief." *Id.* at 1336.

[15] Feltner contends that the district court's findings of willfulness are unsupported by the evidence. In support of this contention, Feltner presents his version of how the evidence should be interpreted. Feltner, however, neglects to mention that the district court's finding is reviewed for clear error. *See* Fed.R.Civ.P. 52(a); *Price v. United States Navy*, 39 F.3d

1011, 1021 (9th Cir. 1994). Feltner's arguments, at best, demonstrate that the facts presented to the district court were susceptible to more than one interpretation. Considering that all 440 of the infringing episodes were broadcast after Columbia's clear termination of the licensing agreements on October 17, 1991, and 415 of them were broadcast after the complaint in this action was filed, we cannot say that the district court's finding was clearly erroneous.

VI. EVIDENTIARY RULINGS REGARDING FELTNER'S RELATIONSHIP TO COUNSEL

[16] Prior to trial, the district court granted Columbia's motion in limine to preclude Feltner from introducing evidence relating to advice of counsel because Feltner refused to answer questions on the issue during his deposition. Feltner now argues that the in limine order precluded Columbia from questioning Feltner at trial about whether his counsel kept him apprised of the progress of the litigation, and the district court's failure to prevent Columbia from doing so was erroneous. Feltner's argument fails for two reasons. First, because he objected to Columbia's questions at trial only on relevance and that on calling for a legal conclusion, he waived the objection he now raises. Furthermore, even if the objection was not waived, the testimony admitted was not precluded by the in limine order because the testimony concerned Feltner's knowledge of the litigation, not whether he relied on the advice of counsel.

VII. CALCULATION OF THE NUMBER OF INFRINGEMENTS

A. The Stations Were Separate Infringers.

[17] Section 504(c)(1) of the Act provides that statutory damages may be awarded "for all infringements involved in the action, with respect to any one work, for which any one infringer is liable individually, or for which any two or more

infringers are liable jointly and severally . . . ." Thus, when statutory damages are assessed against one defendant or a group of defendants held to be jointly and severally liable, each work infringed may form the basis of only one award, regardless of the number of separate infringements of that work. *See Mason v. Montgomery Data, Inc.*, 967 F.2d 135, 143-44 (5th Cir. 1992). However, "where separate infringements for which two or more defendants are not jointly liable are joined in the same action, separate awards of statutory damages would be appropriate." H.R. Rep. No. 94-1476, 94th Cong., 2d Sess., at 162, *reprinted in* 1976 U.S. Code Cong. and Admin. News 5778; *Mason*, 967 F.2d at 144.

[18] By finding that "the 'Who's the Boss?' episodes broadcast by WNFT are separate acts of infringement from the episodes broadcast by WTVX," the district court impliedly found that WNFT and WTVX were not joint tortfeasors with respect to the broadcasting of these episodes. Feltner, relying on *RCA/Ariola International, Inc. v. Thomas & Grayston Co.*, 845 F.2d 773, 778-778 (8th Cir. 1988), argues that this finding was erroneous because Columbia had repeatedly alleged in its complaint that all of the defendants acted together and should be treated as one. *See* ER Tab 1, First Amended Complaint, ¶¶ 18, 19, 31-114.

[19] *RCA/Ariola* is distinguishable. In that case, the district court had found a group of defendants to be jointly and severally liable. *Id.* at 778. On appeal, the Eighth Circuit rejected the plaintiff's argument that the district court's finding was erroneous. Because the plaintiff asserted in its summary judgment papers that the defendants were jointly and severally liable, the plaintiff "invited any error and ha[d] no grounds to complain." *Id.* at 779. In contrast to *RCA/Ariola*, the district court's finding was *contrary* to the allegations in the complaint and it is the defendant who is challenging the findings. Feltner has not presented sufficient facts to develop a "judicial estoppel" argument. *See Rockwell International v. Hanford Atomic Metal Trades*, 851 F.2d 1208, 1210 (9th Cir.

1988) (defining purpose of judicial estoppel as "preventing the use of inconsistent assertions that would result in an 'affront to judicial dignity' and 'a means of obtaining unfair advantage' ") (citations omitted). Thus, despite the fact that the district court's finding on this issue was both favorable to the plaintiff and contrary to the complaint, Feltner has failed to demonstrate that the finding was erroneous.[7]

B. Each Episode Was a Separate Work.

As mentioned, § 504(c)(1) of the Act provides that statutory damages may be awarded "for all infringements involved in the action, with respect to any one work." Section 504(c)(1) further provides that "for purposes of this subsection, all the parts of a compilation or derivative work constitute one work." The district court found that each infringed episode of the television series constituted a separate work for purposes of § 504(c)(1). Feltner argues that each series, and not each episode, constitutes a work.

[20] The two courts to have addressed whether each episode of a television series constitutes a separate work have both held in the affirmative. *Gamma Audio & Video, Inc. v. Ean-Chea*, 11 F.3d 1106, 1116-17 (1st Cir. 1993); *Twin Peaks Prods. v. Publications Int'l*, 996 F.2d 1366, 1380-81 (2d Cir. 1993).[8] Feltner attempts to distinguish these cases by arguing that the episodes at issue are not separate works because they do not have independent economic value.

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[7]Feltner's other argument on this issue—that the finding was erroneous because Feltner was jointly and severally liable with all three stations—is similarly meritless. Because the stations were not jointly and severally liable with each other, Feltner's liability vis-a-vis the stations merely renders him jointly and severally liable for each station's infringements—it does not convert the stations' separate infringements into one.

[8]We note that the Eleventh Circuit, in another case in which Feltner was the defendant, recently agreed that each episode of a television series was a separate work. *MCA Television Ltd. v. Feltner*, 89 F.3d 766, 1996 WL 388406 at *2-*3 (11th Cir. Jul. 26, 1996).

While Feltner correctly states the proper test to apply in analyzing whether each episode is a separate work, *see Gamma Audio*, 11 F.3d at 1117 (focusing on whether each television episode "has an independent economic value and is, in itself, viable"); *Walt Disney Co. v. Powell*, 897 F.2d 565, 569 (D.C.Cir. 1990) (stating that "separate copyrights are not distinct unless they can 'live their own copyright life' ") (quoting *Robert Stigwood Group Ltd. v. O'Reilly*, 530 F.2d 1096, 1105 (2d Cir.), *cert. denied*, 429 U.S. 848 (1976)), the facts upon which Feltner bases his argument—that the episodes are licensed as a series—were addressed and rejected in *Gamma Audio*.

In *Gamma Audio*, the district court found that the episodes were a single work because the copyright holder sold only complete sets of the series to video stores. 11 F.2d at 1117. The First Circuit found this unpersuasive. Instead, the court found significant "the fact that (1) viewers who rent the tapes from their local video stores may rent as few or as many tapes as they want, may view one, two, or twenty episodes in a single setting, and may never watch or rent all of the episodes; and (2) each episode in the . . . series was separately produced." *Id.*

[21] In this case, the different episodes were broadcast over the course of weeks, months, and years. From this fact, it was reasonable for the district court to conclude that, as in *Gamma Audio*, viewers may watch as few or as many episodes as they want, and may never watch all of the episodes. Additionally, it was clear from the record that the episodes could be repeated and broadcast in different orders. Nor does Feltner contest that the episodes were separately written, produced, and registered. Thus, this case comes squarely within the holdings of *Gamma Audio* and *Twin Peaks*.

Feltner also contends that each series was an anthology, a type of "compilation" under § 504(c). *See* § 101 (defining "compilation" as including "collective works"); *id.* (defining

"collective work" as "a work, such as a periodical issue, anthology, or encyclopedia, in which a number of contributions, constituting separate and independent works in themselves, are assembled into a collective whole"). Feltner argues that the question of whether the episodes amounted to a "collective whole" was a factual one. Thus, argues Feltner, the district court's refusal to allow Feltner to produce evidence on the issue, which would have consisted of a license agreement and expert testimony that "programs of this nature are considered to be anthologies," was error.

[22] Even were Feltner allowed to prove that the programs were considered to be "anthologies," he would still have to show that they consisted of "separate and independent works . . . assembled into a collective whole." As mentioned, the evidence was uncontroverted that the episodes were broadcast over the course of weeks, months, or even years, and could be repeated and rearranged at the option of the broadcaster. Because this evidence supports the conclusion that the episodes were not "assembled into a collective whole," it was not error for the district court to reject Feltner's contention that each series was a "compilation" under § 504(c).

The district court did not err in calculating the number of infringements.

VIII. AMOUNT OF STATUTORY DAMAGES AWARDED

[23] "[T]he court has wide discretion in determining the amount of statutory damages to be awarded, constrained only by the specified maxima and minima." *Harris v. Emus Records Corp.*, 734 F.2d 1329, 1335 (9th Cir. 1984). "Within these limits the court's discretion and sense of justice are controlling." *Peer International*, 909 F.3d at 1336 (quoting *F.W. Woolworth Co. v. Contemporary Arts, Inc.*, 344 U.S. 228, 232 (1952)). Feltner argues that the court's award was erroneous because it failed to take into account certain factors

and because it failed to articulate its reasons for the award. However, considering the numerous willful infringements involved, for which the maximum award is $100,000 per work infringed, the district court's award of $20,000 per work infringed is well within the statutory limits and is not an abuse of discretion.

IX. COLUMBIA'S FEES

[24] "The decision to award fees, and the amount of fees awarded, are both reviewed for abuse of discretion." *Frank Music Corp. v. Metro-Goldwyn-Mayer, Inc.*, 886 F.2d 1545, 1556 (9th Cir. 1989), *cert. denied*, 494 U.S. 1017 (1990). While a plaintiff in a copyright action is generally awarded fees by virtue of prevailing in the action, the plaintiff still bears the burden of showing the time spent and hourly rate to be reasonable. *Id.* at 1556-57. Feltner challenges the district court's fee award on three grounds: (1) Feltner was not given enough time to oppose it; (2) "there was no effort to delete items related to unrelated matters"; and (3) the district court granted Columbia all of the fees requested without providing any discussion or explanation.

Feltner's first two challenges miss the mark. As to the first, Feltner has not demonstrated that the district court's refusal to grant a two-week continuance was an abuse of discretion. The district court did grant a one-week continuance, giving Feltner two weeks to prepare an opposition. As to the second, Feltner has not cited any specifics in support of his contention that some entries were not "reasonably necessary to the successful prosecution of [Columbia's] copyright claims," *Frank Music*, 886 F.2d at 1557, and has therefore failed to show that the district court's refusal to delete any entries was an abuse of discretion.

[25] Feltner's third challenge, however, has merit. This Circuit has a "long-standing insistence upon a proper explanation of any fee award" by a district court. *Intel Corp. v. Terabyte*

Int'l, Inc., 6 F.3d 614, 623 (9th Cir. 1993); *see also Frank Music*, 886 F.2d at 1557 ("In setting a reasonable attorneys fee, the district court should make specific findings of the rate and hours it has determined to be reasonable."); *Sealy, Inc. v. Easy Living, Inc.*, 743 F.2d 1378, 1385 (9th Cir. 1984) ("The district court appears to have accepted uncritical plaintiff's representations concerning the time expended on this case, and it awarded the entire amount requested by plaintiff. Such a procedure is inadequate."). The district court, rather than providing a reasoned explanation of its fee award, simply included the entire amount requested in the final judgment. Thus, without expressing any opinion on whether or not the fees claimed were reasonable, we must vacate the district court's fee award and remand the matter so that the district court may provide a reasoned explanation supporting the amount of fees awarded.

X. APPELLANT'S FEES

Feltner and Krypton International contend that they were entitled to attorneys' fees as prevailing parties under the license agreements. Additionally, Krypton International asserts that it was entitled to attorneys fees under 17 U.S.C. § 505 because it prevailed on Columbia's copyright claims.

[26] As to their claim for fees under the license agreement, California law governs. *Diamond v. John Martin Co.*, 753 F.2d 1465, 1467 (9th Cir. 1985). Under California law, a defendant in a contract action is not a prevailing party when the plaintiff voluntarily dismisses the action. Cal. Civ. Code § 1717(b)(2). This is so regardless of whether the dismissal is with or without prejudice. *D & J, Inc. v. Ferro Corp.*, 222 Cal.Rptr. 656, 657 (Ct. App. 1986). Thus Appellants were not prevailing parties under the license agreement.[9]

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[9]In reply, Appellants argue that they should have been awarded fees under Rule 11. However, because Appellants never brought a Rule 11 motion in the district court, this argument is without merit. *See* Fed.R.Civ.P. 11(c)(1)(A) ("A motion for sanctions under this rule shall be made separately from other motions or requests. . . .").

As to Krypton International's claim for fees pursuant to 17 U.S.C. § 505, it has failed to show that the district court's denial of its fee request was an abuse of discretion. *See, e.g., National Conference of Bar Examiners v. Multistate Legal Studies, Inc.*, 692 F.2d 478, 488 & n.12 (7th Cir. 1982), *cert. denied*, 464 U.S. 814 (1983).

CONCLUSION

Except for the district court's award of attorneys' fees to Columbia, we affirm the decision of the district court in all respects. We vacate the fee award and remand the matter on a limited basis so that the district court may provide a reasoned explanation of the amount of fees awarded. We retain jurisdiction over this appeal during the pendency of the limited remand, and the district court shall forward a copy of its order awarding fees within sixty days of the issuance of this remand.

APPENDIX E

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Filed: April 4, 1994

Columbia Pictures Television, Inc.,	)	
	)	No. CV 91-6487 ER (CTx)
Plaintiff,	)	
	)	
v.	)	Order for Judgment
	)	
Krypton Broadcasting of Birmingham, Inc., et al.,	)	This Constitutes Notice of Entry as Required by FRCP, Rule 77(d).
Defendant.	)	

On March 12, 1994, this matter came before the United States District Court for the Central District of California, the Honorable Edward Rafeedie, presiding, for a bench trial on the amount of statutory damages under the Copyright Act to be assessed against defendant C. Elvin Feltner, Jr. (Feltner). The Court having previously granted partial summary judgment in favor of plaintiff Columbia Pictures (Columbia) on the issue of liability for contributory and vicarious copyright infringement against defendant Feltner, plaintiff's claim against Defendant Krypton International Corporation having been dismissed.

WHEREFORE, after considering the evidence presented in Court, arguments of counsel and all other matters presented to the Court, the Court concludes as follows:

1. A total of Four Hundred and Forty (440) episodes of Columbia's television programs were broadcast by the defendant after the termination of the licensing agreements.

The Court concludes that each episode constitutes a separate work for purposes of computing statutory copyright damages. *Twin Peaks Prods. v. Publications, Int'l, Ltd.*, 996 F.2d 1366 (2d Cir. 1993). Furthermore, the Court finds that the "Who's the Boss?" episodes broadcast by WNFT are separate acts of infringement from the episodes broadcast by WTVX. Therefore, there were Four Hundred and Forty (440) separate infringements for which defendant Feltner was liable.

2. Under the Copyright Act, 17 U.S.C. § 504(c), the range for each statutory damage award is from a minimum of $500 to a maximum of $20,000 per work infringed. The minimum is lowered to $200 per work for innocent infringement, and the maximum is raised to $100,000 for willful infringement.

3. In this matter, the Court finds that defendant Feltner's infringement was willful. On previous motion for partial summary judgment, the Court found that Columbia's termination of the licensing agreements on October 17, 1991 was clear and unequivocal. This alone should have put the defendant on notice that his continued broadcast of the Columbia programs was without license, and therefore infringing.

The evidence demonstrates that Feltner was repeatedly warned by both Columbia and people within the Krypton entities that continued broadcasts were unauthorized and infringing. Moreover, the evidence is clear that over 94% of the episodes infringed (415 of the 440 episodes) were broadcast after the Complaint in this action was filed on December 17, 1991.

Defendant contends that he believed the default letters and even the lawsuit were "tools" Columbia was using to collect

the largely unpaid licensing fees defendant owed. The Court finds that it would have been unreasonable to believe this, in light of the clear language of the termination letters and Feltner's extensive experience in the business world. After the October 17, 1991, termination, Columbia stopped shipping tapes with new programming, and stopped sending monthly bills.

Finally, defendant's failure to send even a small payment on any of the license agreements, when there had at least been token payments before the termination, belies defendant's claim that he thought the termination was a mere billing dispute.

4. With a finding of willfulness, the range of statutory damages to be awarded is from $500 to $100,000. In the Ninth Circuit, "[t]he court has wide discretion in determining the amount of statutory damages to be awarded, constrained only by the specified maxima and minima." *Harris v. Emus Records Corp.*, 734 F.2d 1329, 1335 (9th Cir. 1984).

5. The Court therefore awards plaintiff Twenty Thousand Dollars ($20,000) for each work infringed, for a total of Eight Million, Eight hundred thousand dollars ($8,800,000), plus attorney's fees and costs incurred by Columbia in the prosecution of this action, in an amount to be determined by motion of the plaintiff within 15 days of receipt of this Order.

IT IS SO ORDERED.

IT IS FURTHER ORDERED that the Clerk of the Court shall serve, by United States mail, copies of this Order on counsel for the parties in this matter.

Dated: April 4, 1994.

/s/ Edward Rafeedie
EDWARD RAFEEDIE

APPENDIX F

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

COLUMBIA PICTURES TELEVISION, INC.,	
Plaintiff	**No. CV 91-6487-ER**
v.	**ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY ADJUDICATION RE: COPYRIGHT LIABILITY AGAINST DEFENDANT C. ELVIN FELTNER, JR.**
KRYPTON BROADCASTING OF BIRMINGHAM, INC., et al.)	
Defendant	

WHEREAS on December 1, 1992, Plaintiff, Columbia Pictures Television, Inc. ("Columbia") moved the Court for Summary Adjudication Re Copyright Liability Against Defendant C. Elvin Feltner, Jr.

WHEREAS oral argument on the aforesaid motion for summary adjudication was held before the Honorable Edward Rafeedie on September 27, 1993, Henry J. Tashman appearing on behalf of Columbia and Daniel Johnson appearing on behalf of Defendant C. Elvin Feltner, Jr.

WHEREFORE, after considering the moving and opposing papers, arguments of counsel and all other matters presented to the Court, and for the reasons stated in open court IT IS HEREBY ORDERED, as follows:

1. That Plaintiff Columbia Pictures Television, Inc. is entitled to entry of an interlocutory judgment in its favor finding that Defendant C. Elvin Feltner, Jr., is liable, under the doctrines of vicarious copyright infringement and contributory copyright infringement, for Six Hundred Sixty Four (664) separate infringements of Columbia's copyrighted works "WHO'S THE BOSS?", "SILVER SPOONS", "HART TO HART", "T. J. HOOKER", on the dates set forth in Columbia's [Proposed] Statement of Undisputed Facts. The amount of damages with respect to the aforesaid infringements shall be determined at trial.

IT IS SO ORDERED.

IT IS FURTHER ORDERED that the Clerk of the Court shall serve, by United States mail, copies of this Order on counsel for the parties in this matter,

Dated: September 28, 1993

_____

Edward Rafeedie

Davis Wright Tremaine
1000 Wilshire Boulevard
Suite 600
Los Angeles, California 90017
TELEPHONE (213) 229-9600
FAX (213) 627-4874

HENRY J. TASHMAN, ESQ. (State Bar No. 108696)
CHRISTOHER PESCE (State Bar No. 158732)

Attorneys for Plaintiff
COLUMBIA PICTURES TELEVISION, INC.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

COLUMBIA PICTURES TELEVISION
Plaintiff

vs.

KRYPTON BROADCASTING OF BIRMINGHAM, INC.; WABM BIRMINGHAM; KRYPTON BROADCASTING, INC.; KRYPTON INTERNATIONAL CORP. WNFT-TV;BONO EQUITY CORP., a/k/a NORTH FLORIDA 47, INC.; KRYPTON BROADCASTING OF JACKSONVILLE, a Delaware corporation KRYPTON BROADCASTING OF FORT PIERCE, INC., a Florida corporation BROADCASTING OF FORT PIERCE, INC. a Delaware corporation WTWV, INC.,; C. ELVIN FELTNER, JR.; DANIEL S. DAYTON; and ALFRED F. DeCUIR
Defendants.

Case No. 91-6487
ER (Ctx)

PLAINTIFF'S (Proposed) STATEMENT OF (UNCONTRAVERTED) FACTS AND CONCLUSIONS OF LAW RE: LIABILITY FOR COPYRIGHT INFRINGEMENT AGAINST DEFENDANT C. ELVIN FELTNER, JR.

Date: December 28, 1992
Time: 10:00 a.m.
Place: Courtroom of the Honorable Edward Rafeedie

After consideration of the papers in support of and in opposition to plaintiff's motion for summary judgment and the oral argument of counsel, the Court determine that the following facts have been established as:

UNCONTROVERTED FACTS

A. Parties

1. Columbia Pictures Television, Inc. ("Columbia") , is a Delaware corporation with its principal place of business in the County of Los Angeles. First Amended Complaint at ¶1.

2. Krypton International Corporation is a holding company that owns Krypton Broadcasting Corporation. Krypton Broadcasting owns three television stations: Krypton Broadcasting of Jacksonville, Inc., which operates television station WNFT (hereinafter "WNFT"). Krypton Broadcasting of Birmingham, Inc., which operates television station WABM (hereinafter "WABM"); and Krypton Broadcasting of Fort Pierce, Inc., which operates television station WTVX (hereinafter "WTVX "). Feltner Dep. at 44, and 47-50; Plaintiff's Memorandum at 1-2. Mr. Feltner is the Chairman of the Board of each of these corporations. Feltner Dep. 33,37, 44-50; Plaintiff's Memorandum at 1-2.

B. Program Licensing Contracts

3. Columbia licensed WABM to broadcast two television series, "HART TO HART" and "T. J. HOOKER", pursuant to two contracts directly between Columbia and Krypton Broadcasting of Birmingham. *See Ex.* G and H to Elise Keen Decl. Plaintiff's Memorandum at 2.

4. Pursuant to two license contracts between Columbia and WTWV, Inc., Columbia licensed WTWV Inc. to broadcast on television station WTVX, which WTWV, Inc., then owned, "WHO'S THE BOSS" *See Ex.* 8 to Elise Keen Decl., Plaintiff's Memorandum at 2. These contracts were assumed by Krypton Broadcasting of Fort Pierce, Inc. *See Ex.* B to Tashman Decl. At pp. 25-26 and Schedule D thereto; Plaintiff's Memorandum at 2.

5. Columbia licensed WNFT to broadcast "WHO'S THE BOSS?", "SILVER SPOONS", "THE FACTS OF LIFE", "PUNKY BREWSTER, " AND "T. J. HOOKER", all pursuant to license contracts between Columbia and North Florida 47, Inc. the former station owner, *See Ex.* A, B, and E to Elise Keen Decl.; Plaintiff's Memorandum at 2. These contracts were assumed by Krypton Broadcasting of Jacksonville. *See Ex.* C, to Tashman Decl. at § 2 (A) (iv) and (D) and Ex. D and E (the Asset Purchase Agreement); Plaintiff's Memorandum at 2.

6. Each episode of each of these television programs is separately copyrighted, and Columbia holds the copyright to each such episode. Declaration of Gregory K. Boone Decl. At ¶ 3, Plaintiff's Memorandum at 2.

C. Termination of Licensing Contracts

7. On October 17, 1991, Columbia sent a termination letter to Mr. Feltner, advising them that each station was in default for nonpayment of license fees, that such nonpayment constituted an event of default, and that Columbia was

exercising its rights of termination and other remedies under the contracts. Exhibit A to Darakjy Decl.; Plaintiff's Memorandum at 2-3.

8. Columbia essentially made three demands in this termination: (1) that Mr. Feltner's television stations, WABM, WTVX and WNFT cease and desist all further broadcasts of the Columbia programs; (2) that each station return all video cassette copies of the programs to Columbia, and (3) that each station immediately pay the full amount of license fees due under the contracts. Exhibit A to Darakjy Decl. at p.2; Plaintiff's Memorandum at 3. Columbia also expressly warned Mr. Feltner in this letter that any further broadcasts of Columbia programs by his stations would constitute intentional copyright infringement for which Columbia would seek additional remedies. *Id.*

9. The warning to Mr. Feltner was repeated in a letter from Columbia's counsel on November 5, 1991. Ex. G to Tashman Decl./Plaintiff's Memorandum at 3.

D. Conduct Following Termination of Licensing Contracts

10. On each of October 24, 25, 26, 29, 30, and 31, November 4, 5, 6, 7, 8, 11, 12, 13, 14, 15, 18, 19, 20, 21, 22, 25, 26, 27, 28, and 29, and December 2, 3, 4, 5, 6, 7, 9, 10, 11, 12, 13, 16, 17, 18, 19, 20, 23, 24, 25, 26, 27, 30, and 31, 1991, and January 1, 2, 3, 6, 7, 8, 9, 10, 20, 21, 22, 23, 24, 27, 28, 29, 30, and 31, February 3, 4, 5, 6, 7, 10, 11, 12, 13, 14, 17, 18, 19, 20, 21, 24, 25, 26, 27, and 28, March 2, 3, 4, 5, 6, 9, 16, 17, 18, 19, 20, 30, and 31, April 1, 2, 3, 6, 7, 8, 10, 13, 14, 15, 16, 17, 20, 21, 22, 23, 24, 27, 28, 29, and 30, May 1, 4, 5, 6, 7, 8, 11, 12, 13, 14, 15, 18, 19, 20, 21, 22, 25, 26, 27, and 28, June 1,2, 3, 4, 5, 8, 9, 10, 11, 12, 15, 16, 17, 18, 19, 22, 23, 24, 25, 26, 29, 30, July 1, 2, 3, 4, 6, 7, 8, 9, 10, 13, 14, 15, 16, 17, 20, 22, 23, 24, 27, 28, 29, 30, and 31, August 11, 12, 13, 14, 17, 18,

19, 20, 21, 24, 25, 26, 27, 28 and 31, 1992, and October 1, 2, 5, 6, 7, 8, 9, 12, 13, 14, 15, 16, 19, 20, 21, 22, and 23, 1992, WTVX broadcast an episode of "WHO'S THE BOSS?" a total of Two Hundred Twenty Four (224) broadcasts. Decl. of Constance L. Thomas at ¶ 4; Plaintiff's Memorandum at 3-4.

11. On each of October 24, 25, 28, 29, 30, November 1, 4, 5, 6, 7, 8, 11, 12, 13, 14, 15, 18, 20, 21, 22, 25, 26, 27, 28, 29, December 2, 3, 4, 5, 6, 9, 10, 11, 12, 13, 16, 18, 20, 23, 24, 26, 27, 30, and 31, 1991, and January 1, 2, 3, 6, 7, 8, 9, 10, 13, 14, 16, 17, 20, 21, 22, 23, 24, 27, 28, 29, 30 and 31, February 3, 4, 5, 6, 7, 10, 11, 12, 13, 14, 17, 18, 19, 20, 21, 24, 25, 26, 27, 28, and March 2, 3, 4, 5, 6, 9, 10, 11, 12, 15, 16, 17, 18, 19, 20, 23, 24, 25, 26, 27, 30, and 31, April 1, 2, 3, 6, 7, 8, 9, 10, 12, 13, 14, 15, 16, 17, 20, 21, 22, 23, 24, 27, 28, 29, and 30, May 1, 4, 5, 6, 7, 8, 11, 12, 13, 14, 15, 18, 19, 20, 21, 22, 25, 26, 27, 28, and 29, June 1,2, 3, 4, 5, 8, 9, 10, 11, 12, 15, 16, 17, 18, 19, 22, 23, 24, 25, 26, 29, and 30, July 1, 2, 7, 8, 13, 16, 17, 20, 22, 24, 27, 29, 30, and 31, August 3, 4, 5, 6, 7, 10, 11, 12, 13, 14, 17, 18, 19, 20, 21, 24, 25, 26, 27, 28, and 31, September 1, 2, 3, 4, 7, 8, 9, 10, 11, 14, 15, 16, 17, 18, 21,22, 23, 24, 25, 28, 29, and 30, October 1, 2, 5, 6, 7, 8, 9, 12, 13, 14, 15, and 16, 19, 20, 21, 22, 23, 26, 27, 28, 29, 30, and November 2, 3, 4, 5, 6, 9, 10, 11, 12, 13, 16, 17, 18, 19, and 20, 1992, WNFT broadcast an episode of "WHO'S THE BOSS," a total of Two Hundred Sixty-Seven (267) broadcasts. Constance L. Thomas Decl. At ¶6, Plaintiff's Memorandum 4-5.

12. On each of November 9, 16, 23, 26 and 30, and December 7, and 22, 1991, January 4, March 21 and April 4, and 11, and May 14 and 28, 1992, WNFT broadcast an episode of "SILVER SPOONS," a total of thirteen 13 broadcasts. Constance L. Thomas Decl. at ¶7; Plaintiff's Memorandum at 5.

13. On each of December 10, 12, 13, 16, 17, 18, 19, 20, 23, 26, 27, 30, and 31, 1991, and January 1, 2, 3, 6, 7, 8,9, 10,13, 14, 15, 16, 17, 20, 21, 22, 23, 24, 27, 28, 29, 30, 31, February 3, 4, 5, 6, 7, 10, 11, 12, 13, 14, 17, 18, 19, 20, 21, 24, 25, 26, 27, 28, March 2, 3, 4, 5, 6, June 26 and 30, July 2, 3, 7, 10, 13, 14, 16, 24, 27, 28, 31, August 5, 6, 7, 10, 11, 12, 13, 21, 24, 26, 27, 28, 31, and September 1, 3, and 4, 1992, WABM broadcast an episode of "HART TO HART", a total of Eighty-Nine (89) broadcasts." Constance L. Thomas Decl. at ¶10; Plaintiff's Memorandum at 5.

14. On each of December 10, 11, 12, 13, 14, 17, 18, 19, 20, 21, 23, 26, 27, and 31, 1991, and January 1, 2, 3, 4, 6, 7, 8, 9, 10, 11, 13, 14, 15, 16, 17, 18, 20, 21, 22, 23, 24, 25, 27, 28, 29, 30, and 31, February 1, 3, 4, 5, 6, 8, 10, 11, 12, 13, 14, 15, 17, 18, 19, 20, 21, 22, 24, 25, 26, 27, 28, 29, and March 2, 3, 4, 5, 6, and 7, WABM broadcast an episode of "T. J. HOOKER, a total of Seventy-One (71) broadcasts." Constance L. Thomas Decl. At ¶ 10; Plaintiff's Memorandum at 5.

E. Mr. Feltner's authority over the stations

15. Mr. Feltner supervises the management of all of the Krypton International divisions, Feltner Dep. 37, approves all policy decisions for the three approves all contracts involving the stations. *Id.* , and testified that "[t]he program schedule is totally my responsibility. I take recommendations from other people, but the final decision is mine." Feltner Dep. at p. 51-52; Plaintiff's Memorandum at 6, Mr. Feltner reviews and authorizes everything broadcast on the stations. Feltner Dep. at 283-85 & 300; Plaintiff's Memorandum at 6. Station personnel adhere to the policy that only Mr. Feltner is authorized to make program changes, Feltner Dep. 282-283; Plaintiff's Memorandum at 6.

CONCLUSIONS OF LAW

1. The Court has jurisdiction of this action pursuant to 28 U.S.C. §§ 1338 (a)(b) and 1367(a).

2. Columbia seeks summary adjudication pursuant to Fed. R. Civ. P. 56(c). Mr. Feltner has raised no genuine issues of material fact that would preclude summary judgment on the issues raised in Columbia's motion.

3. Columbia owns valid copyrights in each episode of the television series "WHO'S THE BOSS?" "HART TO HART", "T. J. HOOKER,""ONE DAY AT A TIME", "SILVER SPOONS", "THE FACTS OF LIFE" and "PUNKY BREWSTER." *See generally* Declaration of Gregory K. Boone.

5. As the owner of the copyright of each episode of "SILVER SPOONS," "WHO'S THE BOSS?," "T. J. HOOKER," and "HART TO HART," Columbia holds the exclusive right to perform the work publicly. 17 U.S.C. § 106(4). Broadcasting a work on television is a public performance. *See MGM Continental Broadcasting Co. v. United Video*, 693 F. 2d 622, 625 (7th Cir. 1982); 2 M. Nimmer, *Nimmer on Copyright* §8.14 [B].

6. The Krypton-owned and operated television station's infringed Columbia's copyrights by broadcasting episodes of "SILVER SPOONS", "WHO'S THE BOSS?", "T. J. HOOKER" AND "HART TO HART" after the stations' licenses with Columbia were terminated. *Paramount Pictures v. Metro Program Network*, 962 F 2d. 775, 779 (8th Cir. 1992). Each of the 664 broadcasts of an episode made after the program license was terminated constituted an infringement of a copyrighted work. *Id.*

7. Mr. Feltner personally participated in, indeed, caused and materially contributed the acts constituting each

infringement after ignoring repeated requests from Columbia that he cease and desist the activity. Accordingly he is jointly and severally liable for those infringements under the doctrine of contributory infringement. 3 Nimmer § 12.04 [A][8][a]

8. In addition, Mr. Feltner had the right and ability to supervise the infringing activities and, as the sole shareholder of the company that owns the infringing stations, has a direct financial interest in that activity. Accordingly Mr. Feltner also is vicariously liable for each infringement. *E.g. Southern Bell Tel, & Tel.*, 756 F. 2d at 811.

9. Columbia is entitled to damages for the multiple infringements of its copyrights in an amount to be determined at trial.

10. Mr. Feltner has neither pled nor offered evidence of facts sufficient to raise a genuine issue of material fact as to the applicability of its affirmative defenses, including failure to state a claim; unclean hands; contributory negligence; equitable estoppel; misrepresentation; authority to broadcast programing; excused performance; and prevention of performance. Columbia therefore, is entitled to an order adjudicating Mr. Feltner liable for copyright six hundred and sixty-four (664) infringements of Columbia's copyrighted works.

Date this 30th day of November, 1992

R. Bruce Easter, Esquire
DAVIS WRIGHT TERMAINE
2600 Century Square
1501 Fourth Avenue
Seattle, Washington 98101

DAVIS WRIGHT TERMAINE
Henry J. Tashman, Esq.
Attorney for Plaintiff
Columbia Pictures Television, Inc.
By:_____
Henry J. Tashman, Esquire

APPENDIX G

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Civil Minutes – General

Case No. CV 91-6487-ER (CTx) Date: February 7, 1994

Title: Columbia Pictures Television -v- Krypton Broadcasting of Birmingham, Inc., et al.

Present:

The Honorable Edward Rafeedie

Judy Matthews	Mary Tucker
Courtroom Clerk	Court Reporter
Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:
None Present	None Present

Proceedings: In Chambers

The Court having read and considered all pleadings submitted, IT IS HEREBY ORDERED that motion defendants, Krypton International, C. Elvin Feltner, Daniel Dayton, and Alfred CeCuir, to file out of time a motion to vacate this Court's September 28, 1993, order of partial summary judgment is denied.

cc: Counsel of Record

Minutes From 11 Initials of Deputy Clerk ____
Civil – Gen

APPENDIX H

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Honorable Edward Rafeedie, Judge Presiding

Columbia Pictures Television, Inc.,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Case No.
	)	CV-91-6847-ER
Krypton Broadcasting of	)	
Birmingham, Inc., et al.,	)	Volume One
	)	
Defendants.	)	
	)	

Reporter's Transcript of Proceedings
Los Angeles, California
Tuesday, March 15, 1994

* * *

[10]

The Court: Now, did you wish to make an opening statement, what it is you are going to offer to the Court by way of proof.

By the way, in case there is any doubt about it, the Court will treat every broadcast of every episode as a separate infringement and not treat each series as one infringement, or if they were broadcast on separate stations, that is one infringement. Each broadcast of each episode the Court believes would be an infringement.

* * *

APPENDIX I

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Honorable Edward Rafeedie, Judge Presiding

Columbia Pictures Television, Inc.,	)	
Plaintiff,	)	
vs.	)	Case No. CV-91-6847-ER
Krypton Broadcasting of Birmingham, Inc., et al.,	)	Volume Two
Defendants.	)	

Reporter's Transcript of Proceedings
Los Angeles, California
Wednesday, March 16, 1994

* * *

[203]

The Court: I already dealt with that. I already ruled that I treat each of these as separate –

Mr. Chaifetz: Well, I would just make an offer of proof that this gentleman is going to testify that these programs –

The Court: This is a question of law. We don't need a witness to testify about it. The Court has concluded as a matter of law –

Mr. Chaifetz: Well, Your Honor, the underlying question is one of fact of whether they are independent programs or are they a part of one larger unit. And the way that Columbia deals with those –

The Court: Let me ask, you understanding the licensing agreement, were the payments made for these as anthologies or was it made by each individual episode?

Mr. Chaifetz: Well, actually, Your Honor, I'm delighted that you asked that question because I do have something directly on that.

The Court: In that case, I withdraw the question.

Mr. Tashman: Your Honor, in reliance on your [204] earlier ruling at the outset of this trial, we have not argued or briefed this –

The Court: I had made that ruling so we would not get into it.

Mr. Tashman: Your Honor, we will stipulate that "Who's the Boss?" and other series are sold under a single contract. That doesn't make any difference.

The Second Circuit has said that in the *Twin Peaks* case, and the First Circuit has said that in the *Gamma Video* case, that the fact that something is licensed under a single license, does not make it a single work.

The Court: Yes. I think that's decided.

Now I think we are going to quit for lunch.

Mr. Chaifetz: May I just respond to what Mr. Tashman just said?

The recent First Circuit case adopted the theory of the District of Columbia Circuit, which is, and I have the case here.

I would like to just read a sentence or two from it just to explain what our theory is.

Mr. Tashman: Your Honor, we have briefed this. Mr. Chaifetz has briefed this. The Court has ruled on it. We are here for a trial.

The Court: But counsel here never gives up.

Mr. Chaifetz: I'm sorry, Your Honor

[205] The First Circuit, since Mr. Tashman referred to *Gamma Audio,* said at 11 F.3d, 1116, 1117 as follows, "The test set forth in Walt Disney is a functional one, with the focus on whether each expression," or in our case television episode, "has an independent, economic value, and is in itself viable."

And our position is that the individual episodes here have no independent economic value, and they are not viable.

In that particular case, *Gamma Audio,* the evidence showed that the series, the various episodes of the series were sold separately in certain circumstances.

There is no evidence here, and none that we are aware of, that that's ever the case. And I think that's an important distinction.

Aside from that, I would –

The Court: Your point is that each series can only be one infringement; Is that right?

Mr. Chaifetz: That is correct.

The Court: No matter how many times episodes are shown?

Mr. Chaifetz: That is correct, Your Honor. That each one is one work and that the statutory – award of statutory damages

– it can vary in size depending on the number of infringements of a total series, but it can only [206] be one award.

I would just like the Court to – let me see if I can find it here, to take a look –

Mr. Tashman: Again, this is a subject that we briefed –

The Court: Just a moment. You are interrupting counsel.

Mr. Chaifetz: If the Court would just indulge me for a moment and look at page – I believe it is page eight, 142. It's a rider T to a license agreement involving the "T.J. Hooker".

And it says, I will just read a very small portion of it, "A generic trailer or promo is designed to promote a continuing series of television motion pictures or an anthology series as distinguished from single episode or picture."

Therefore, Columbia in it's own document here has referred to "T.J. Hooker" as an anthology series. Under the law, under section 504(C)1, that means that it has to be treated as one work.

I submit even though this wasn't in the contracts, they should be treated the same way.

The Court: All right.

You made your point.

I have ruled, and I stand by the ruling, and there [207] will be no evidence on that to the contrary.

* * *

APPENDIX J

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Filed: August 23, 2001
Cathy A. Catterson, Clerk
U.S. Court of Appeals

Columbia Pictures Television,	)	No. 99-56215
	)	
Plaintiff-Appellee,	)	ORDER
	)	
v.	)	
	)	
C. Elvin Feltner, Jr.,	)	
	)	
Defendant-Appellant.	)	
	)	

Before: PREGERSON, SILVERMAN, and TALLMAN, Circuit Judges.

The panel has voted to deny appellant's petition for rehearing with a suggestion for rehearing en banc.

The suggestion for rehearing en banc has been circulated to the full court, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P.35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.